However, there is no law that supports Appellants' conclusion that the constitutionally-required minimum number of redistricting plans in a decade – one – is also the maximum allowable. As the Ninth Circuit concluded in *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991): "*Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall."

Without limitation, Art. I, § 4 of the United States Constitution vests in the state legislatures the power to draw their Congressional districts; there is no limit on the number of times a state legislature may redistrict. Likewise, although Congress has reserved to itself the power to regulate the time, place and manner of Congressional elections, 2 U.S.C. §§ 2a & 2c (2005), it has not restricted the number of times a state legislature may redistrict.

In short, a reading of the plain language of both federal constitutional and statutory provisions demonstrates that there is no limit on the number of redistricting plans that a state may implement during a decade. Likewise, a review of federal caselaw demonstrates that that redistricting plans may be amended throughout the decade. *Reynolds,* at 583-84; *Daly v. Hunt*, 93 F.3d 1212, 1228 n.15 (4th Cir. 1996); *Garza,* 918 F.2d at 772; *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 (N.D.Fla. 1996) ("*Johnson II*") (three-judge panel), *aff'd sub nom., Johnson v. Smith*, 132 F.3d 1460 (11th Cir. 1997).

While some states impose restrictions upon the frequency of redistricting, the majority have not chosen to do so. In Georgia, for example, the General Assembly is not constrained by constitutional or statutory law with

respect to the number of times redistricting plans may be amended in the course of a decade, and redistricting plans have routinely been amended throughout the decade.

III. PROHIBITING REDISTRICTING MORE THAN ONCE A DECADE WILL PERMIT EGREGIOUS PARTISAN GERRYMANDERING IN THE ORIGINAL REDISTRICTING PLAN AND FORECLOSE ANY EFFORT TO REMEDY THAT PLAN FOR AN ENTIRE DECADE

Using Appellants' theory, the gross partisan gerrymander enacted by the Georgia General Assembly in 2001, *see* App. 1, would have been irrevocable. As the first plan enacted following the Census, Appellants would argue that the Georgia plan was immune from a partisan gerrymander attack because as it was enacted after the Census and ostensibly for the purpose of equalizing population, its "sole purpose" could not have been the maximization of partisan advantage.

In fact, even a cursory review of Georgia's 2001 Congressional redistricting plan demonstrates that the maximization of partisan advantage was the sole purpose of the plan; the fact that the Census had been released and the districts' populations needed to be equalized was a happy coincidence. Looking at the 2001 plan first as a whole, App. 1, and then by individual district, App. 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, there can be no doubt that the districts were grossly gerrymandered for political purposes. Absent the General Assembly's ability to redistrict again, Georgia voters would have been locked into a Congressional redistricting plan in which "districts" bore no semblance to a reasonable definition of that word.

Contrary to Appellants' fears, the Georgia General Assembly's mid-decade redistricting did not result in a partisan gerrymander. Instead, the legislature employed traditional redistricting criteria which had been used in Georgia Congressional plans prior to the 2001 plan – keeping counties whole, achieving true contiguity (rather than point contiguity) and compactness,[2] honoring the traditional cores of districts – and complied with the requirements of one person, one vote

[2] A comparison of the compactness measurements between the 2001 and 2005 districts shows a marked improvement in the 2005 plan. The change in the results of perimeter test, which measures the total distance around a district by measuring the line distance, demonstrates how contorted the districts were in the 2001 plan. By eliminating the numerous subdivision splits and meandering jagged boundaries, the 2005 General Assembly substantially reduced the attenuated 2001 geographic boundaries by a factor of more than one-third (8695-5589=3106; 3106/8693=36%). Likewise, the scores improved under the Polsby-Popper test, which deems districts closer to 1 more compact and closer to 0 less compact.

2001 District Number	2001 District Number	2001 District Number	2001 District Number	2001 District Number	2001 District Number
001	001	1106.76	0.12	763.77	0.26
002	002	697.12	0.26	692.98	0.29
008	003	1054.98	0.04	495.02	0.21
004	004	112.97	0.25	135.93	0.23
005	005	188.24	0.09	108.48	0.26
006	006	211.99	0.12	173.88	0.29
007	007	480.31	0.07	227.78	0.24
003	008	949.72	0.15	713.98	0.18
010	009	487.17	0.2	371.31	0.4
009	010	872.07	0.12	614.32	0.2
011	011	1167.02	0.03	306.4	0.36
012	012	770.7	0.11	738.29	0.2
013	013	596.3	0.03	246.75	0.12
Sum	Sum	8695.35	N/A	5588.89	N/A
Min	Min	N/A	0.03	N/A	0.12
Max	Max	N/A	0.26	N/A	0.4
Mean	Mean	N/A	0.122308	N/A	0.249231
Std. Dev.	Std. Dev.	N/A	0.076284	N/A	0.074662

and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. § 1971 et seq. In doing so, the General Assembly succeeded in creating a Congressional plan comprised of actual districts rather than pieces of geography strung together for partisan purposes. App. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28.

In eliminating the contorted districts and returning cognizable districts to the voters, the Republican-controlled 2005 Georgia General Assembly did not simultaneously engage in the maximization of partisan advantage, as demonstrated by the following chart. Using the Bush vote in the 2000 election as its measurement, the chart shows a noticeable lack of an effort to grab partisan advantage:

Member	District 2001 Plan	District 2005 Plan	% Bush 2001 Plan	% Bush 2005 Plan	Change in Bush%, 2001 to 2005 Plans
Kingston	1	1	64.5-R	62.4-R	-2.1
Bishop	2	2	51.0-R	47.6-D	-3.4
Westmoreland	8	3	70.1-R	67.0-R	-3.1
McKinney	4	4	29.3-D	29.9-D	+0.6
Lewis	5	5	28.9-D	27.2-D	-1.7
Price	6	6	69.2-R	68.2-R	-1.0
Linder	7	7	72.0-R	69.2-R	-2.8
Marshall	3	8	52.5-R	58.1-R	+5.6
Deal	10	9	71.2-R	71.0-R	-0.2
Norwood	9	10	67.8-R	62.8-R	-5.0
Gingrey	11	11	52.2-R	65.4-R	+13.2
Barrow	12	12	45.7-D	47.8-D	+2.1
Scott	13	13	42.0-D	43.3-D	+1.3

As a result of the new plan, there are only two districts in which the change in the 2000 Bush vote was greater than 5 percentage points. However, in the 2001 plan, both districts had previously been painfully contorted specifically to avoid a Republican district. *See* App. 17, 23. When the districts took on truly compact and contiguous shapes, the political performance numbers more accurately reflected the existing partisan strength. *See* App. 8, 24.

In summary, the ability to redistrict during the decade actually allowed the Georgia General Assembly to correct the gross partisan gerrymander that was the 2001 Georgia Congressional plan. Without such authority, the Georgia General Assembly would have had no ability to remediate Georgia's grossly gerrymandered 2001 Congressional districts and replace them with reasonable districts that provide fair representation to all Georgians. Mid-decade redistricting does not, as Appellants suggest, always result in partisan gerrymandering. Sometimes it cures it.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

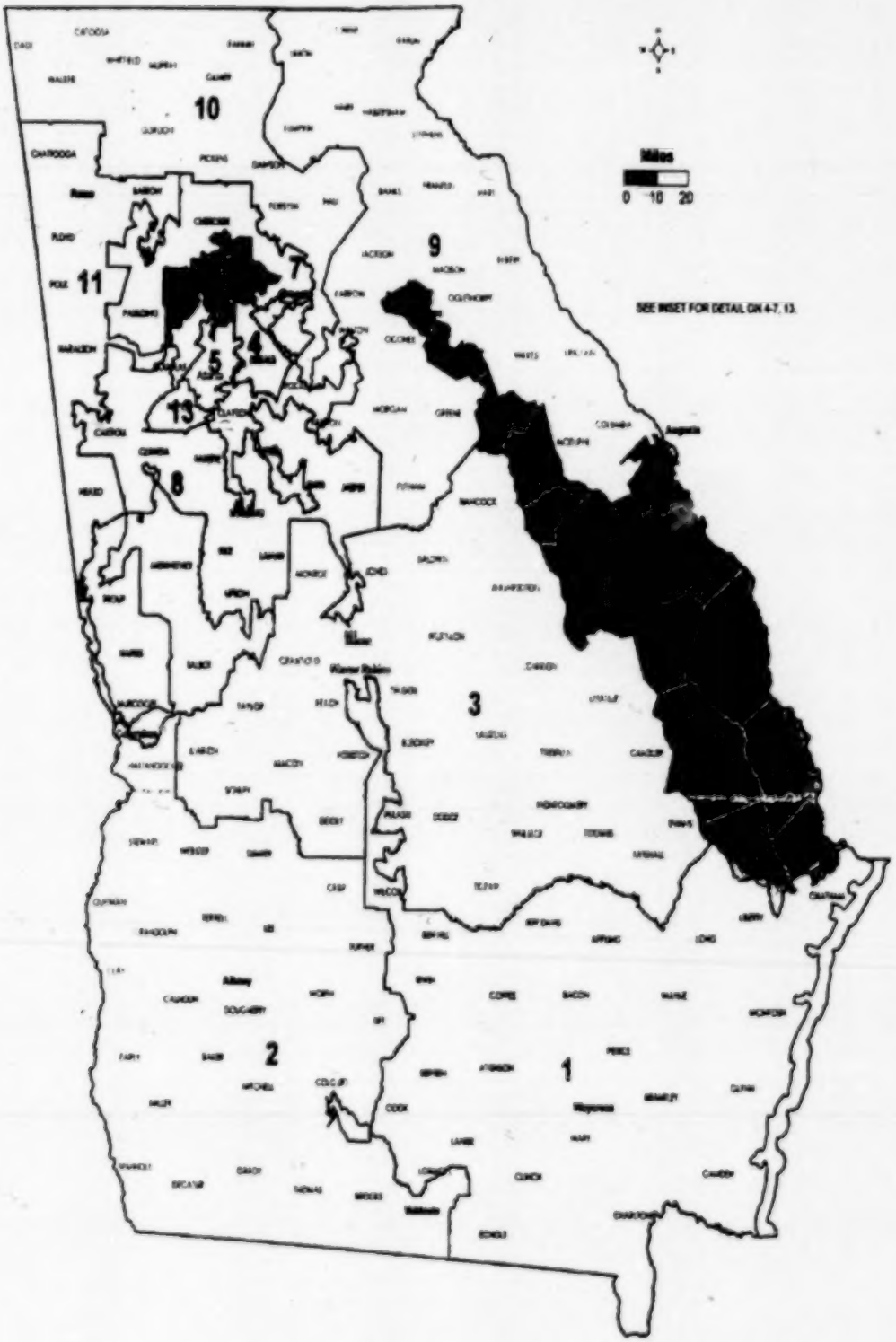
Respectfully submitted,

ANNE W. LEWIS, ESQ.
Counsel of Record for Amicus Curiae
FRANK B. STRICKLAND, ESQ.
STRICKLAND BROCKINGTON LEWIS LLP
1170 Peachtree Street, N.E., Suite 2000
Atlanta, GA 30309
(Telephone) 678.347.2200
Attorneys for Amici Curiae Speaker of the Georgia House of Representatives Glenn Richardson; the President Pro Tempore of the Georgia State Senate Eric Johnson; the Majority Leader in the Georgia House of Representatives, Jerry Keen; the Majority Leader in the Georgia State Senate, Tommie Williams; the Chairman of the Legislative and Congressional Reapportionment Committee of the Georgia House of Representatives, Bobby Franklin; and the Reapportionment and Redistricting Committee of the Georgia Senate, Chip Rogers

February 1, 2006

Georgia

Congressional Districts for 2002-2004 elections.

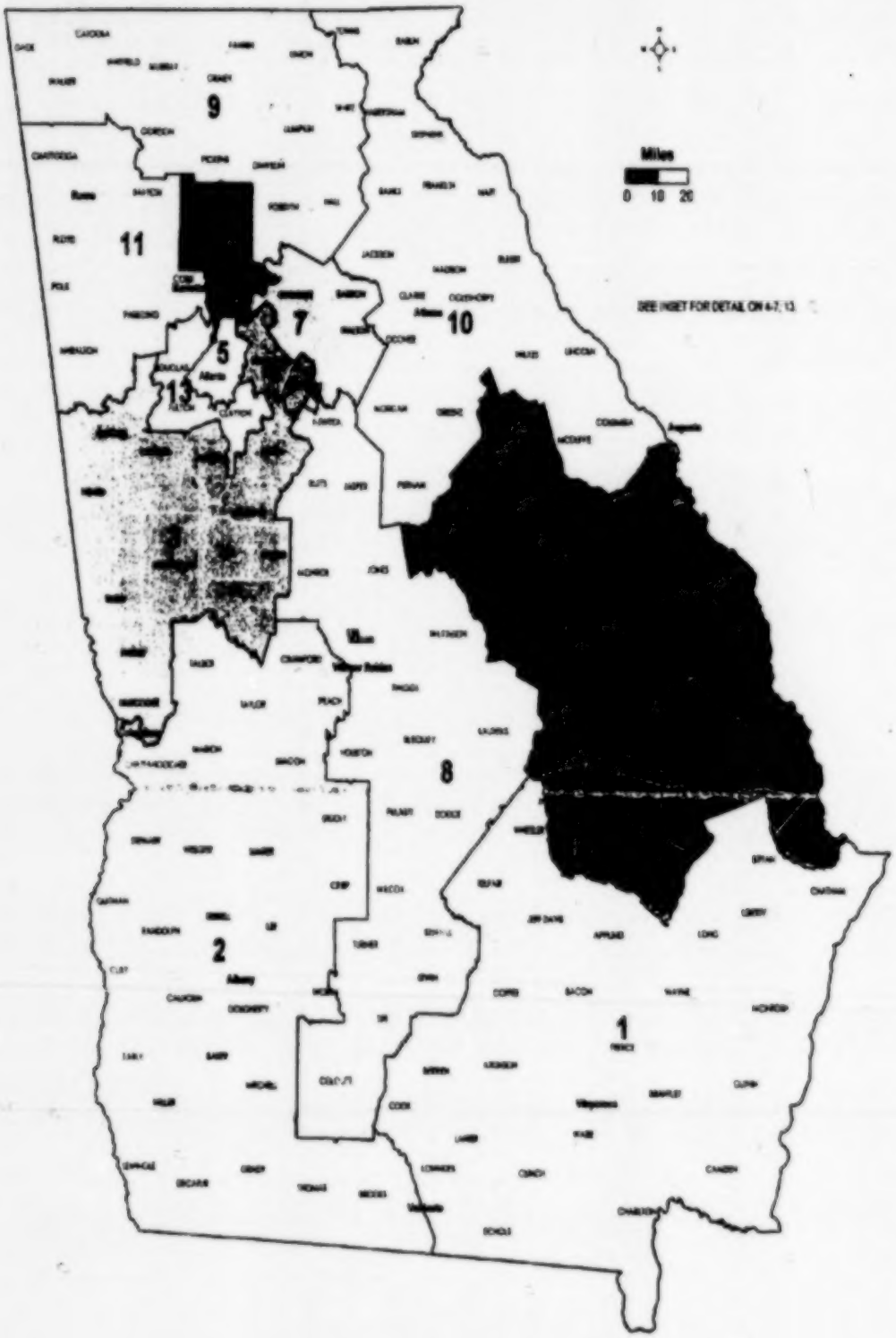


Congressional district boundaries first effective for the 2002 elections.

App. 1

Georgia

Congressional Districts for 2006-2010 elections.

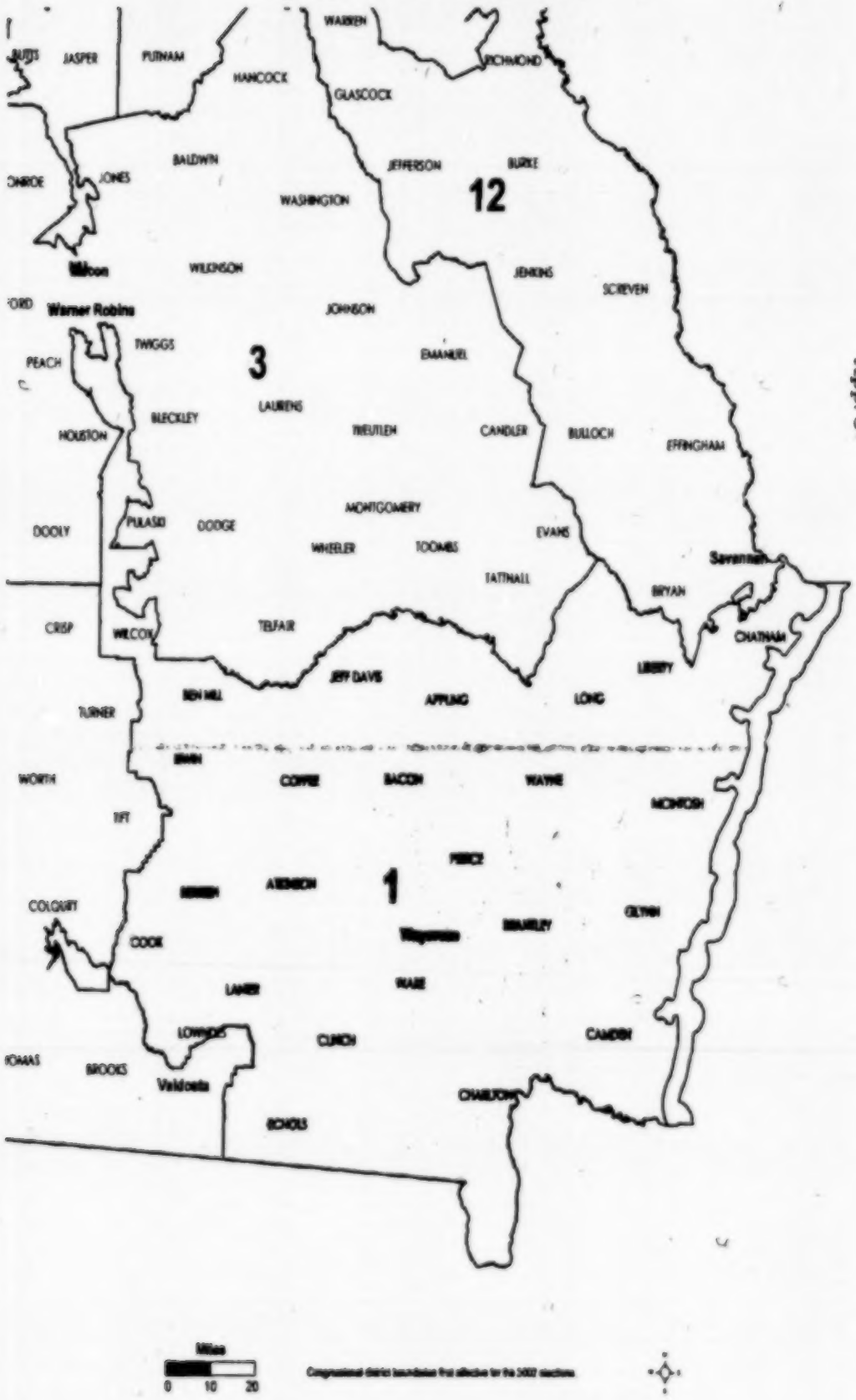


Congressional district boundaries first effective for the 2008 election

App. 2

Georgia

Congressional Districts for 2002-2004 elections.

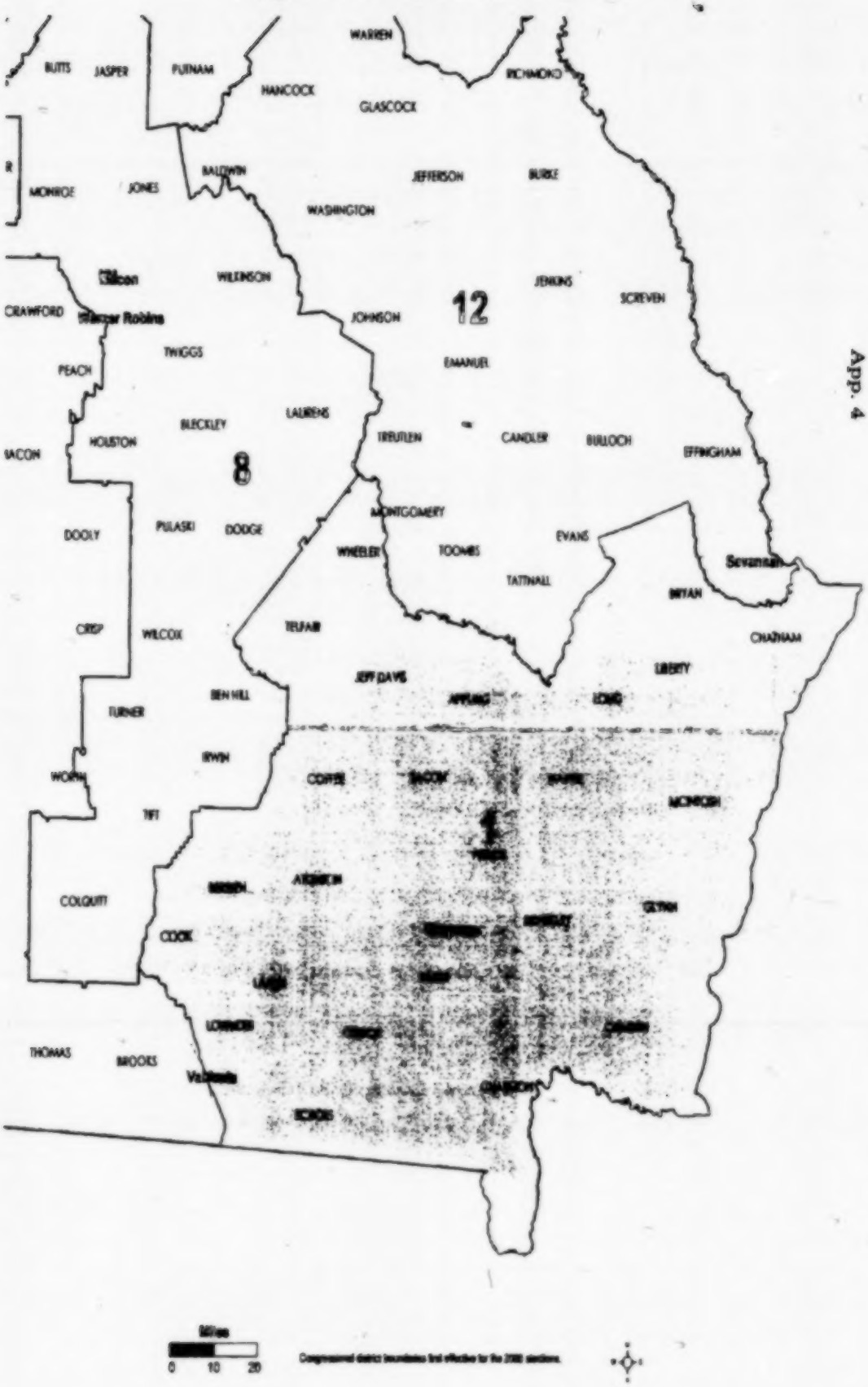


Congressional district boundaries first effective for the 2002 elections

App. 3

Georgia

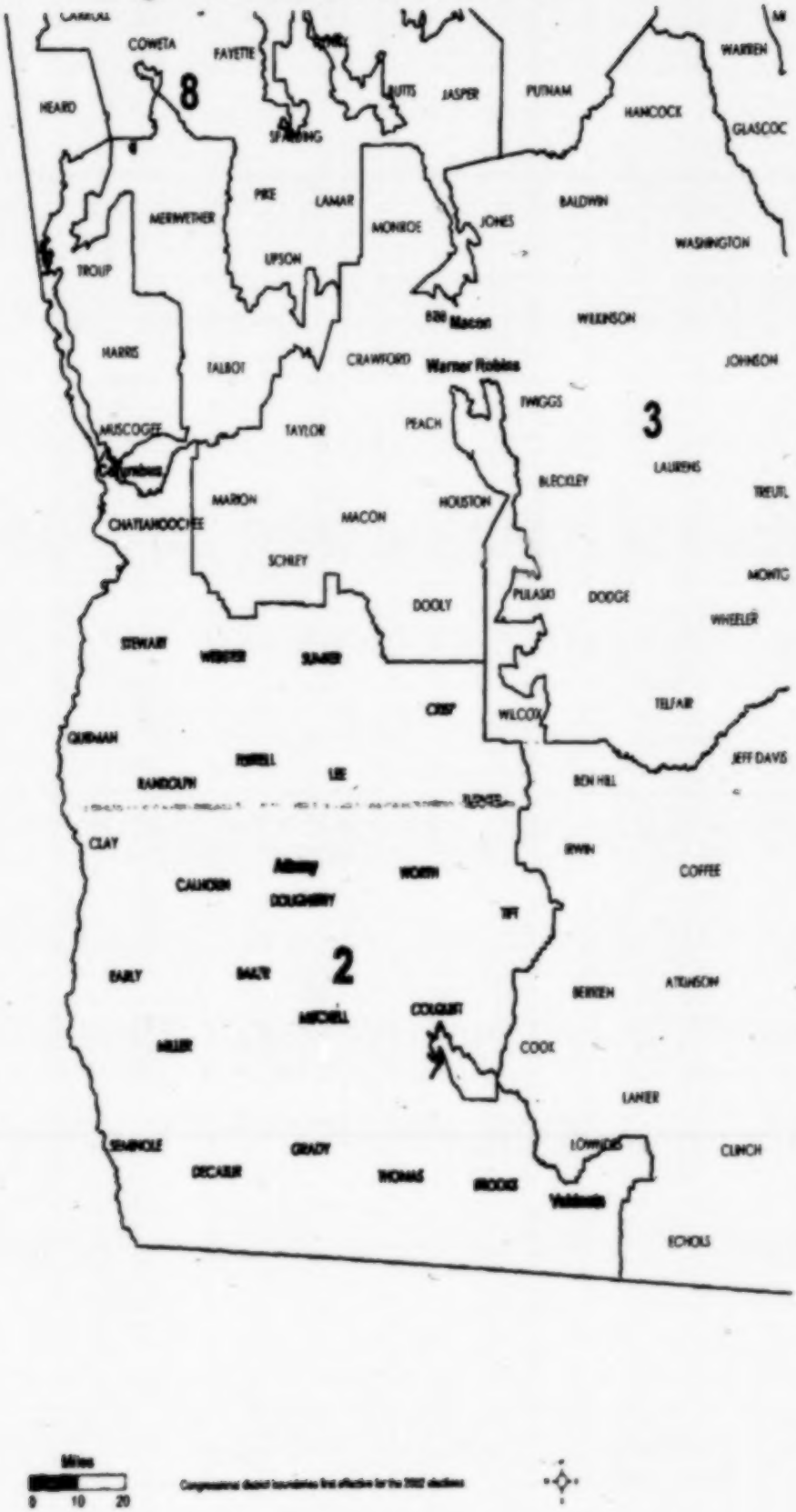
Congressional Districts for 2006-2010 elections.



App. 4

Georgia

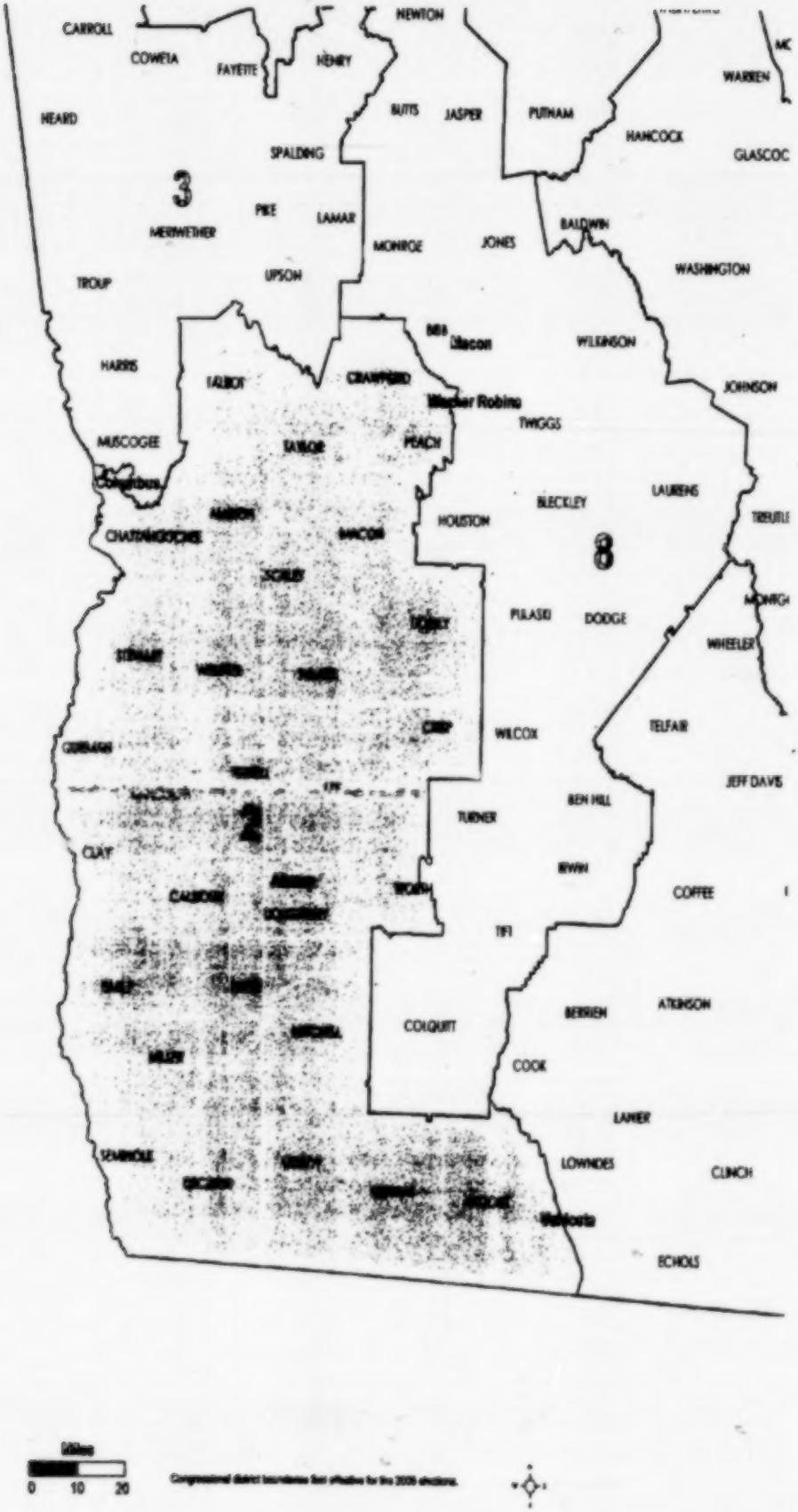
Congressional Districts for 2002-2004 elections.



Congressional district boundaries first effective for the 2002 elections

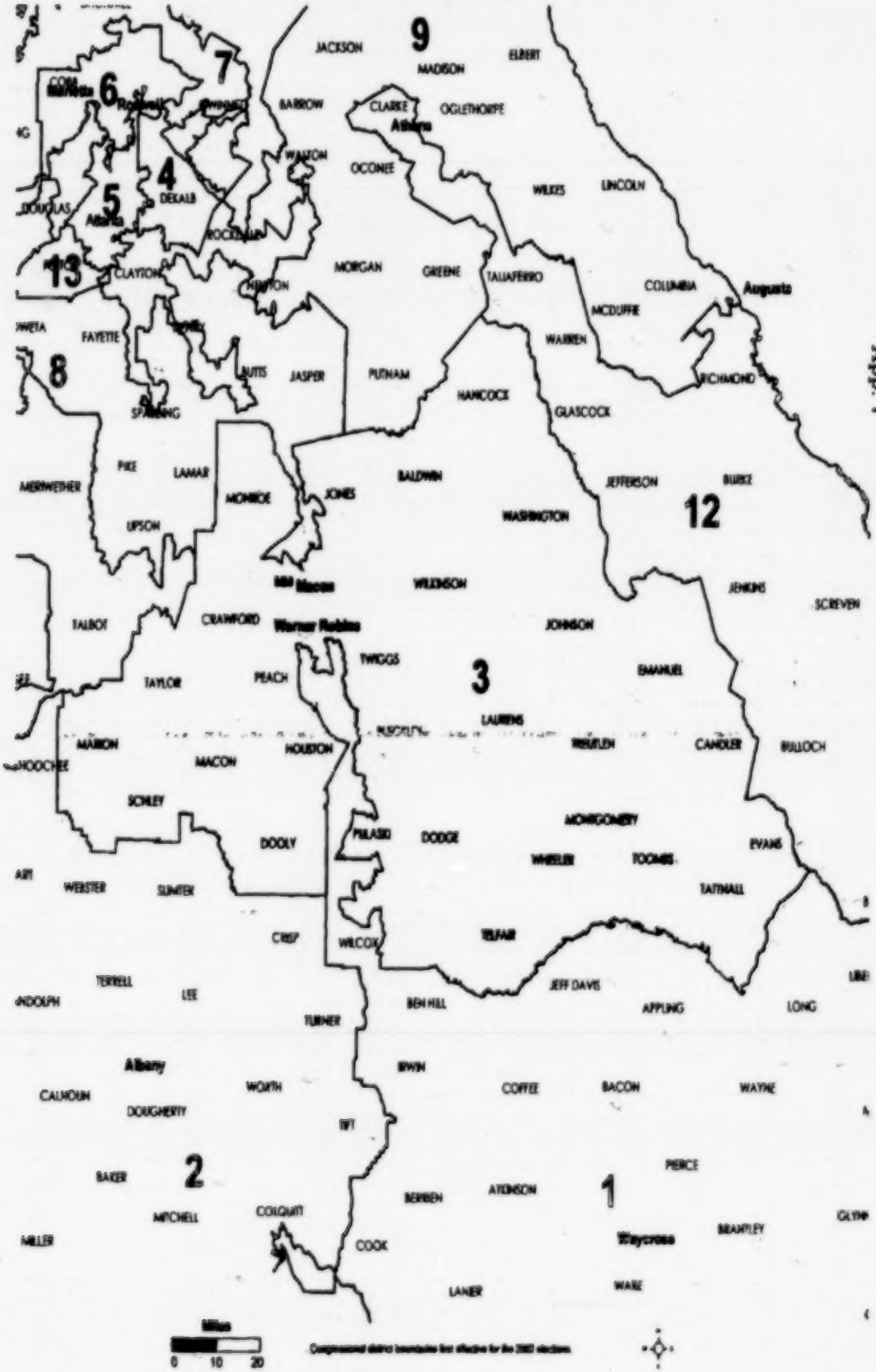
Georgia

Congressional Districts for 2006-2010 elections.



Georgia

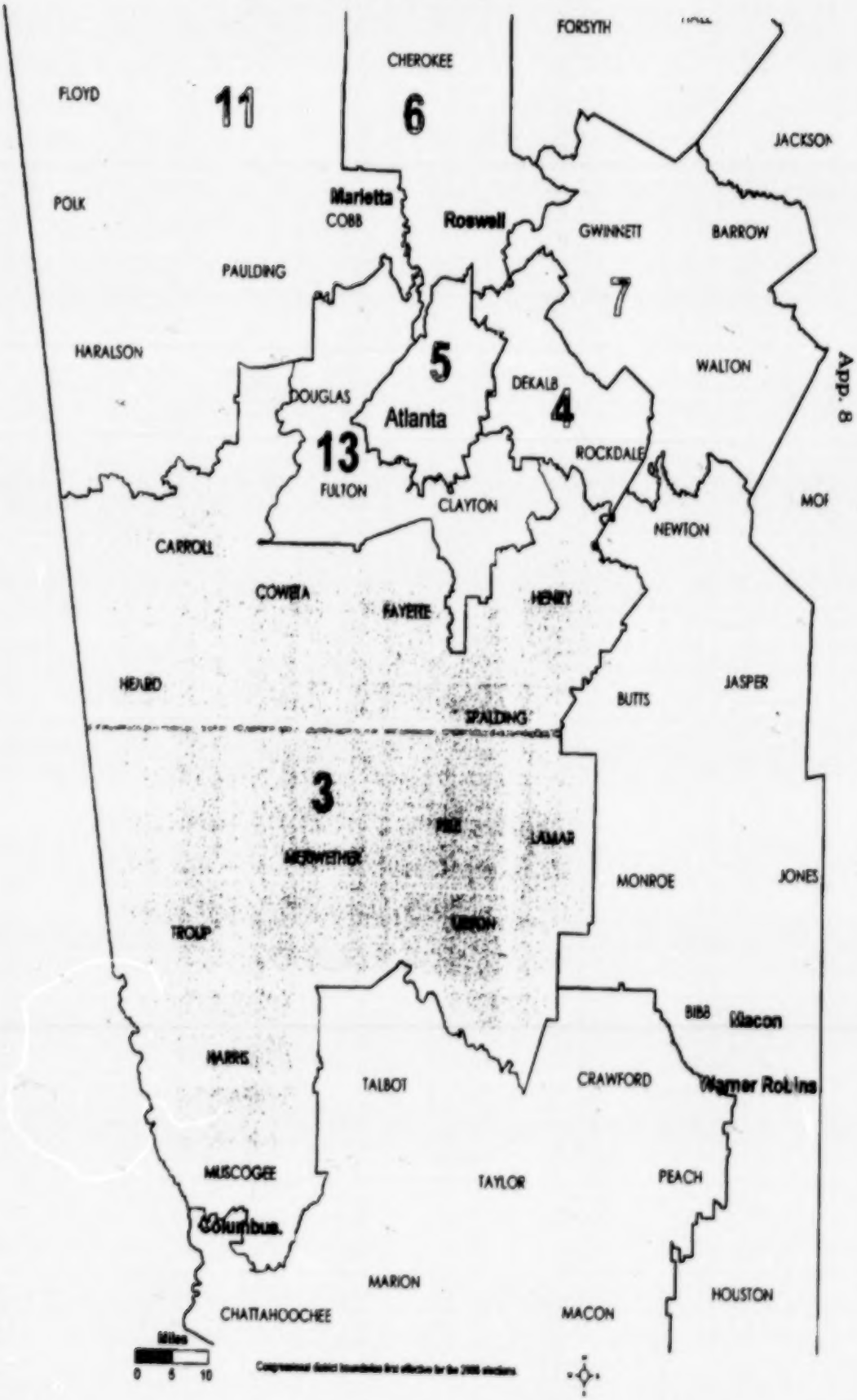
Congressional Districts for 2002-2004 elections.



App. 7

Georgia

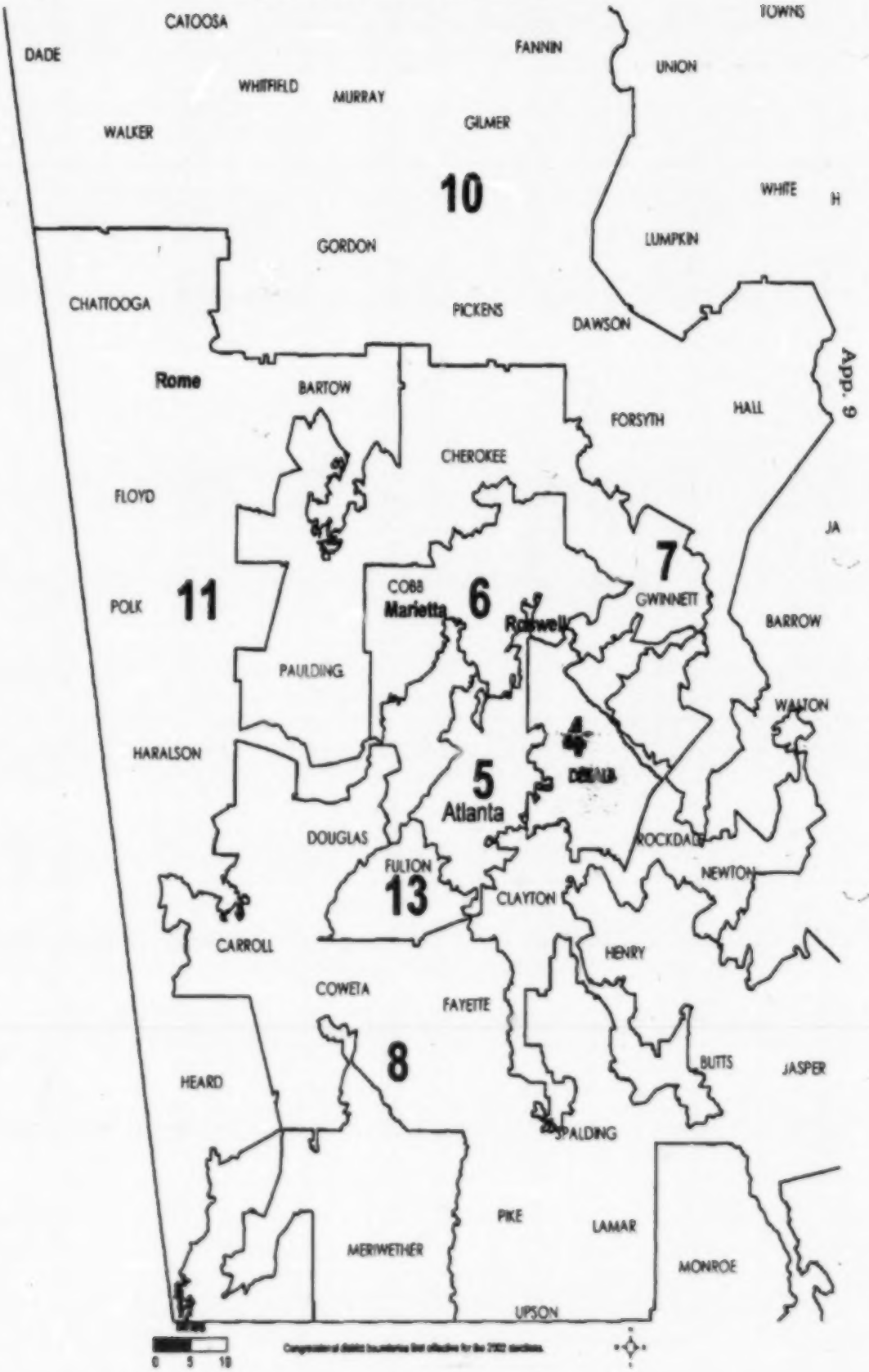
Congressional Districts for 2006-2010 elections.



App. 8

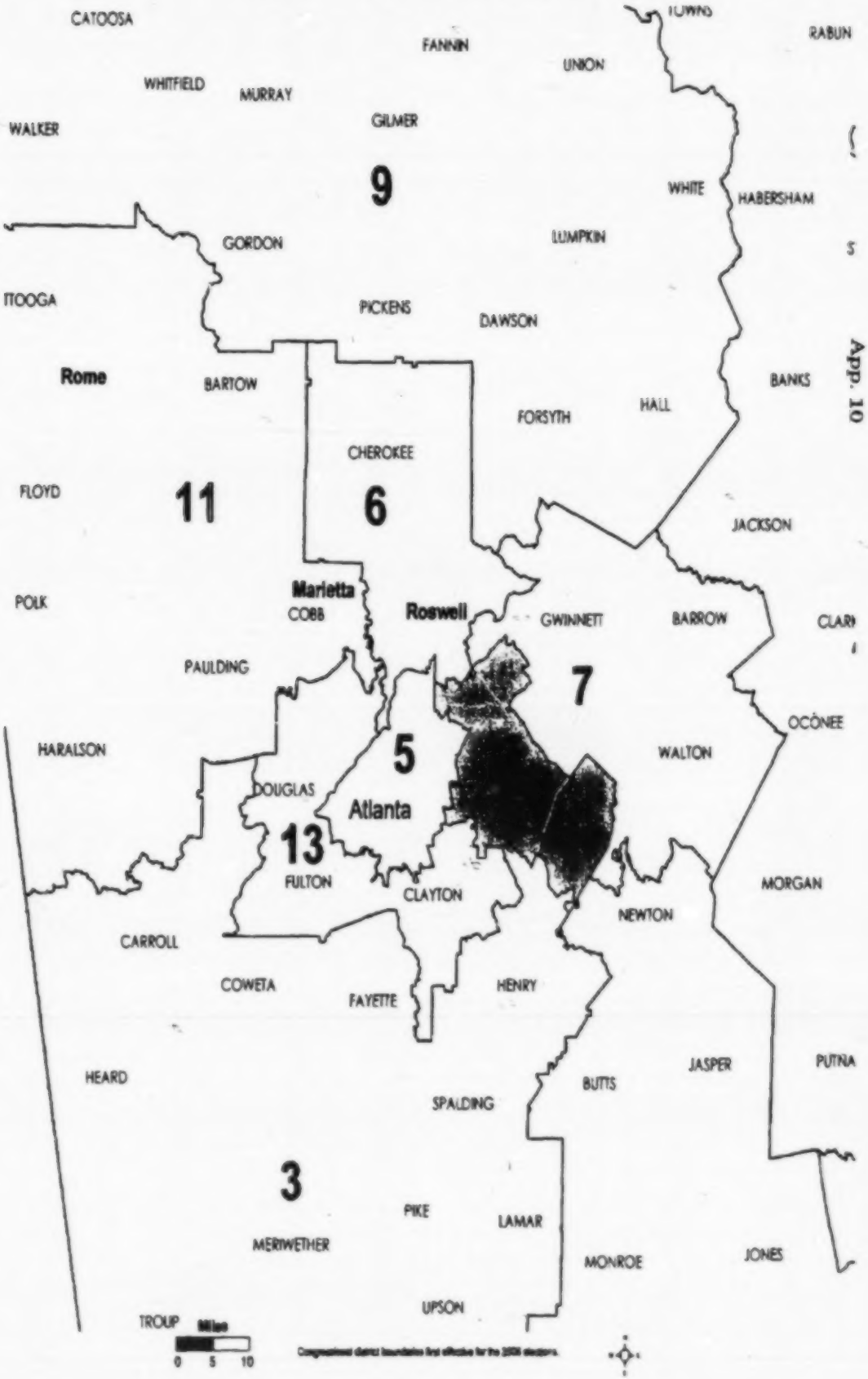
Georgia

Congressional Districts for 2002-2004 elections.



Georgia

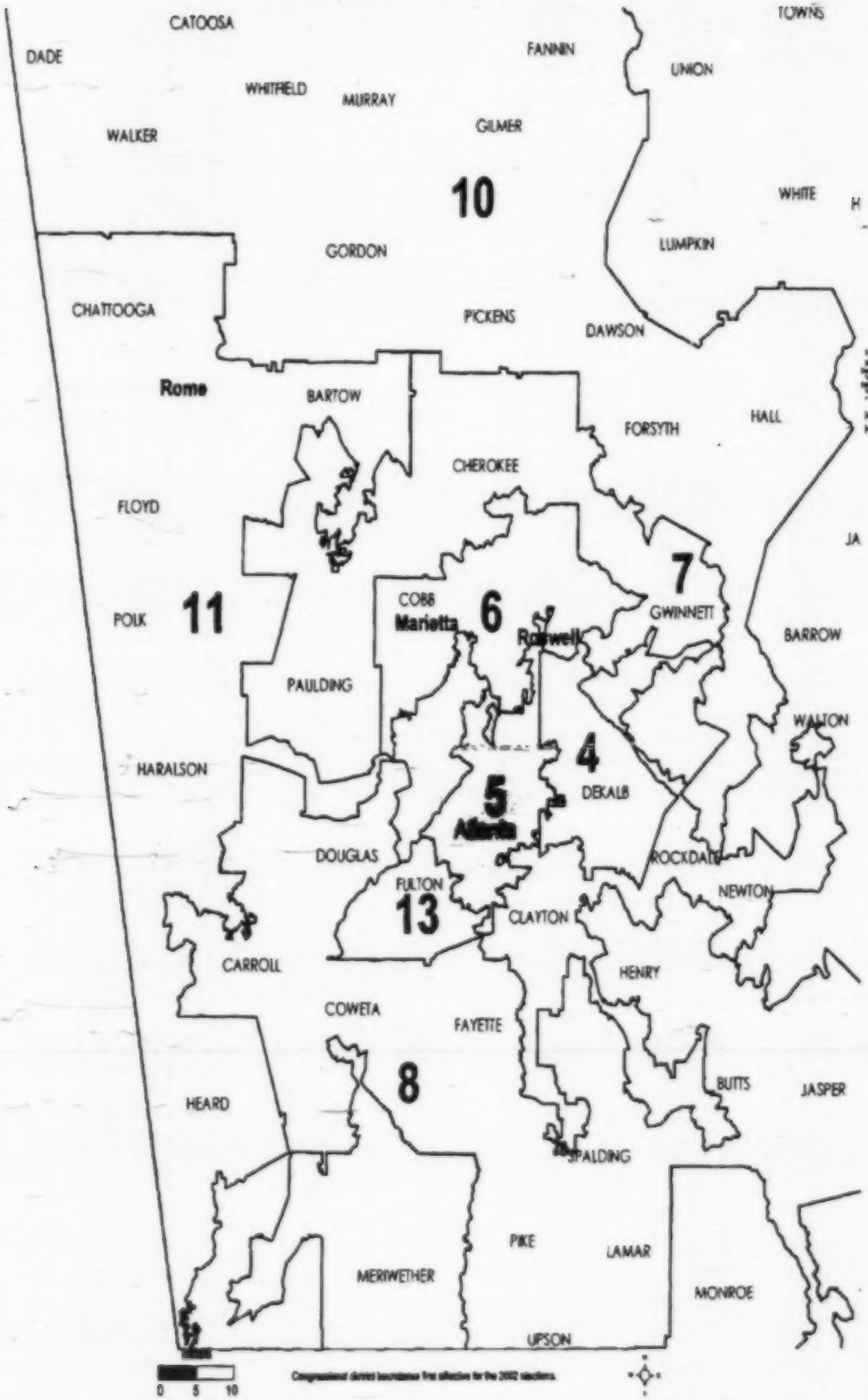
Congressional Districts for 2006-2010 elections.



App. 10

Georgia

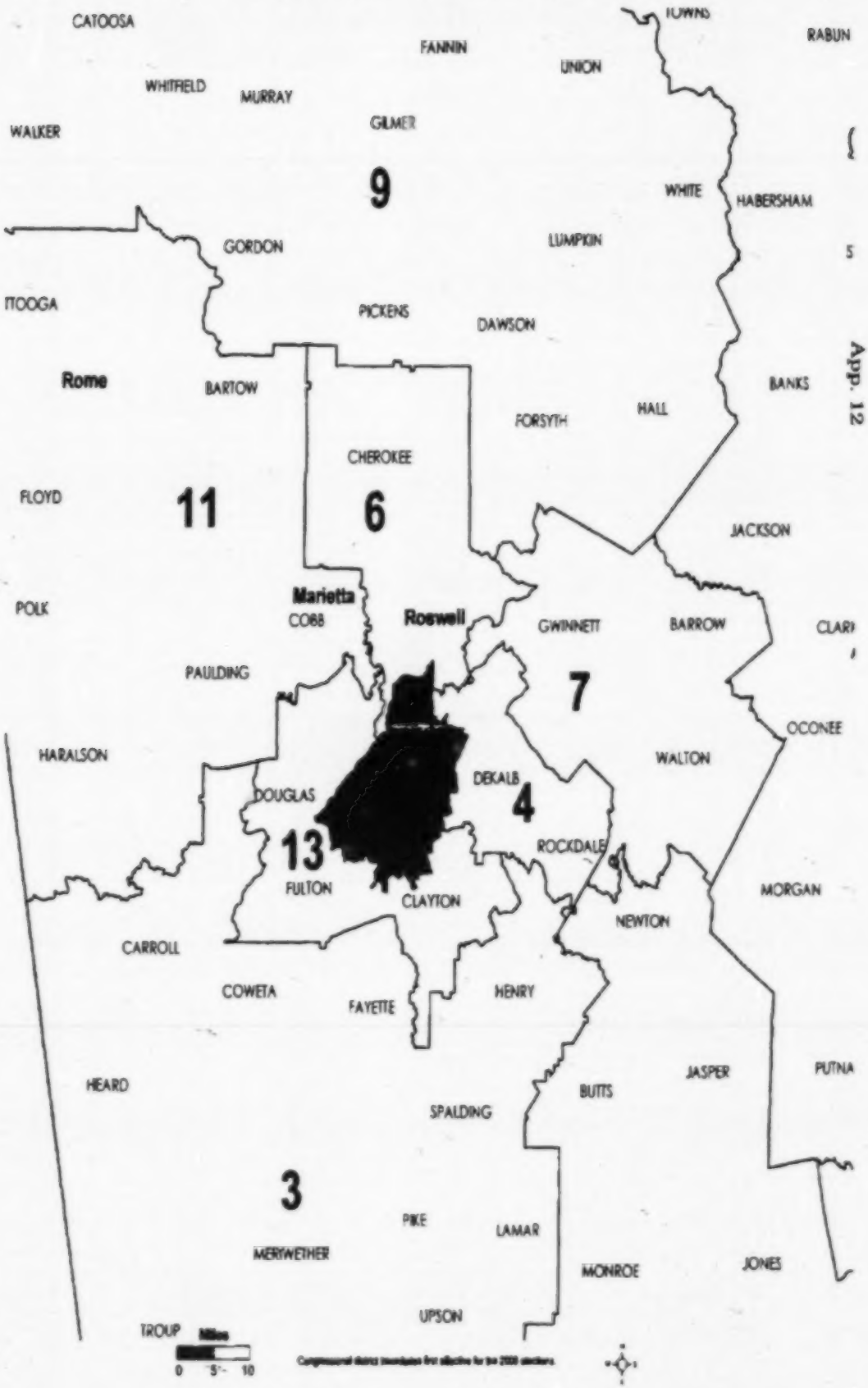
Congressional Districts for 2002-2004 elections.



App. 11

Georgia

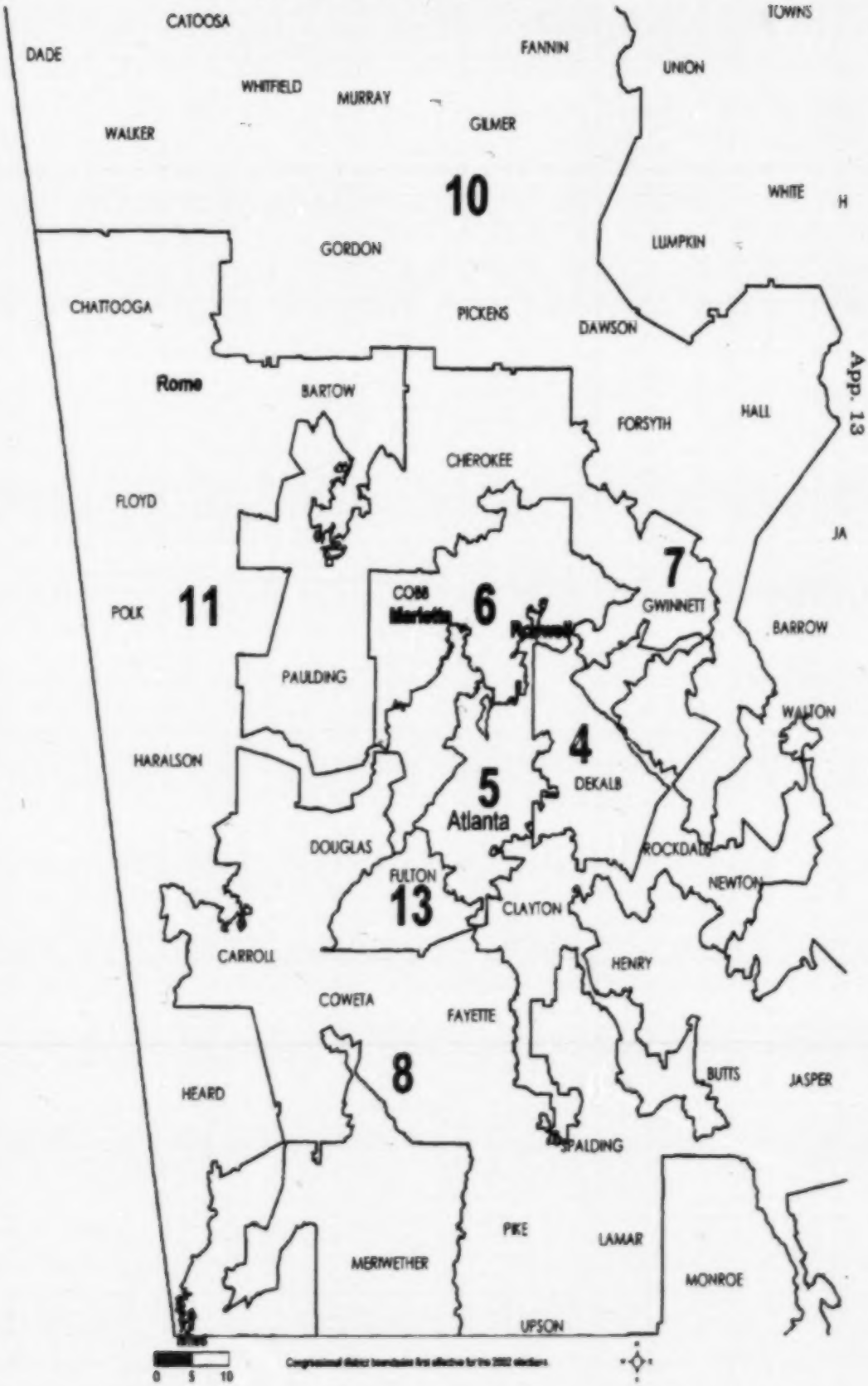
Congressional Districts for 2006-2010 elections.



App. 12

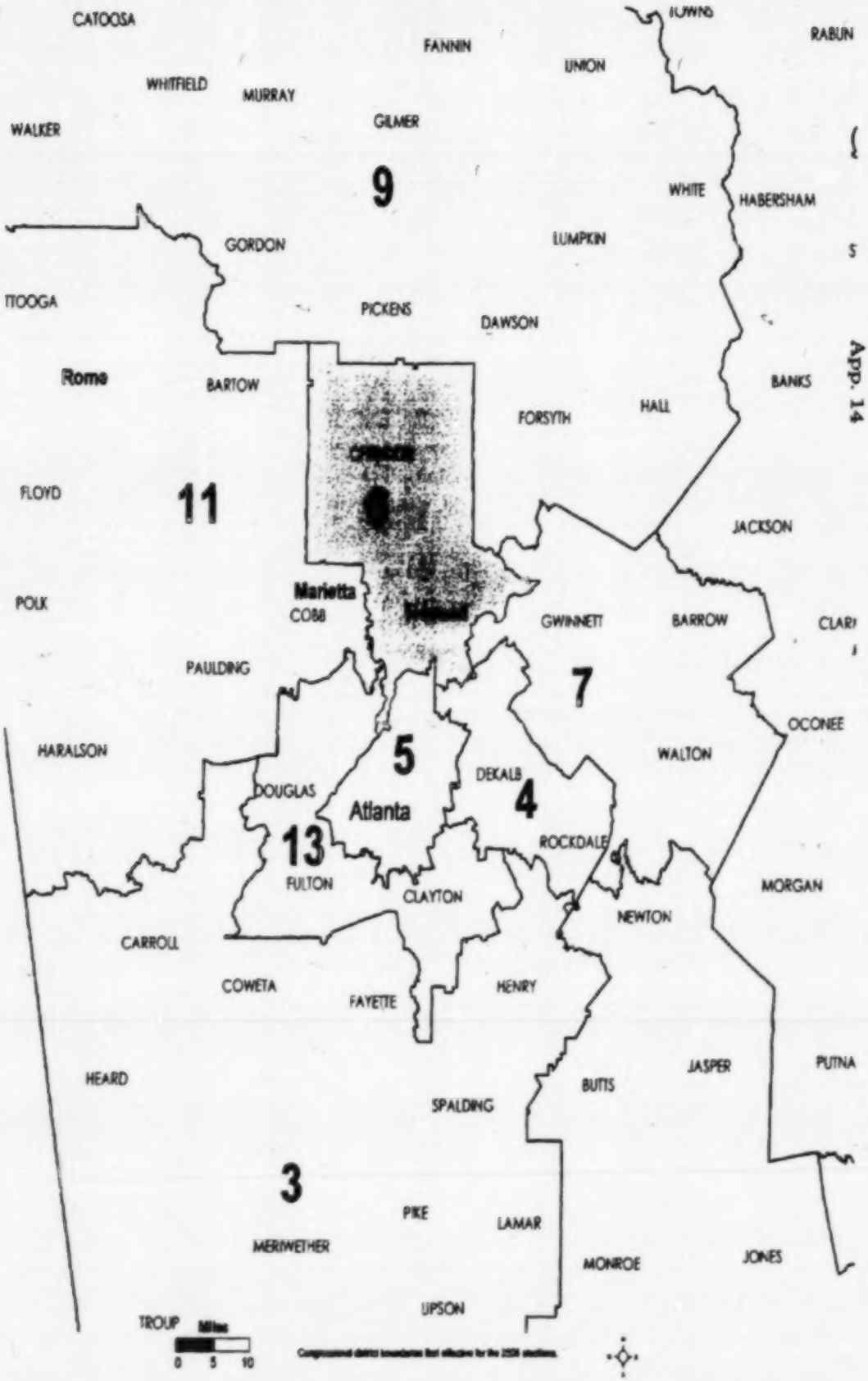
Georgia

Congressional Districts for 2002-2004 elections.



Georgia

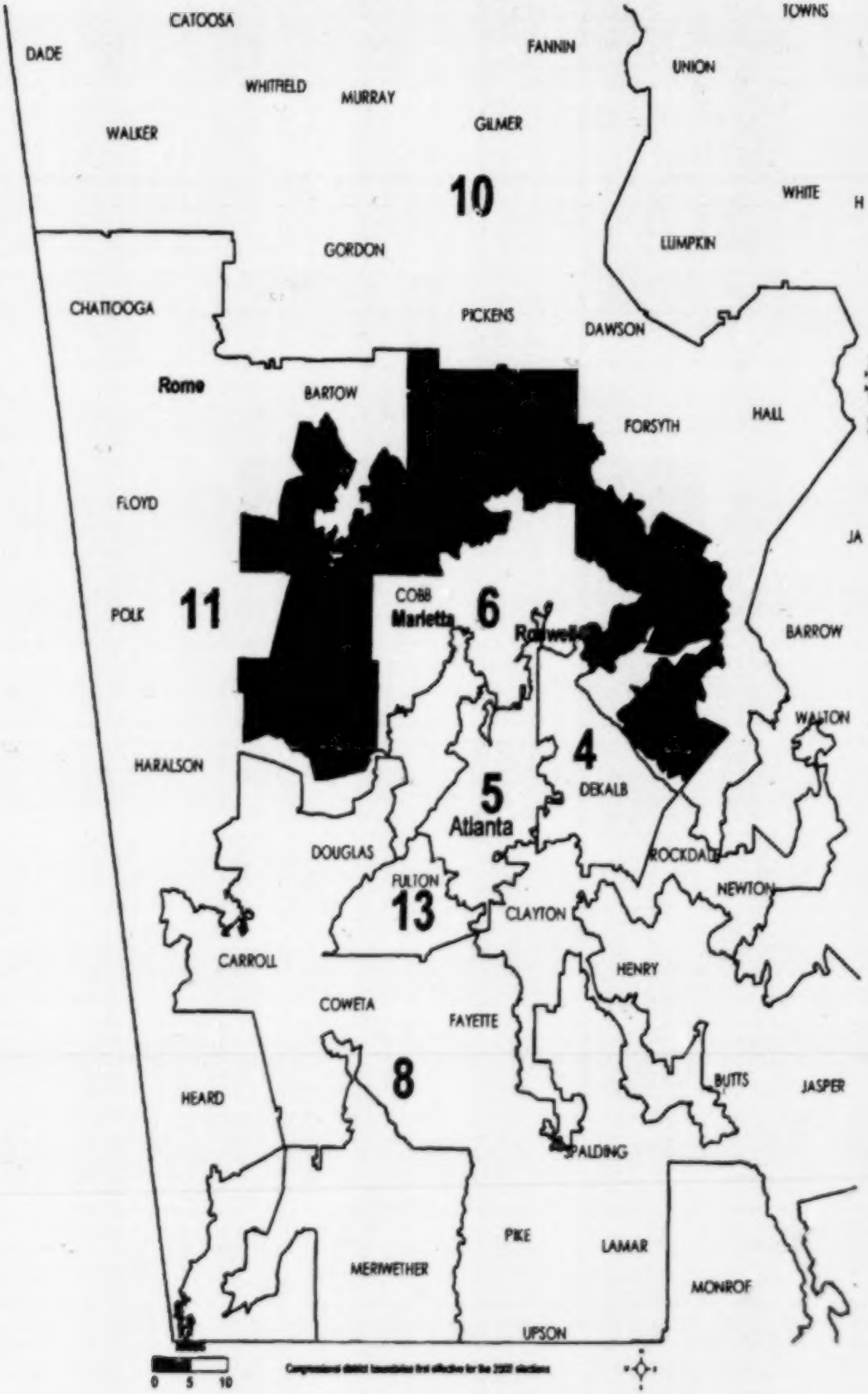
Congressional Districts for 2006-2010 elections.



App. 14

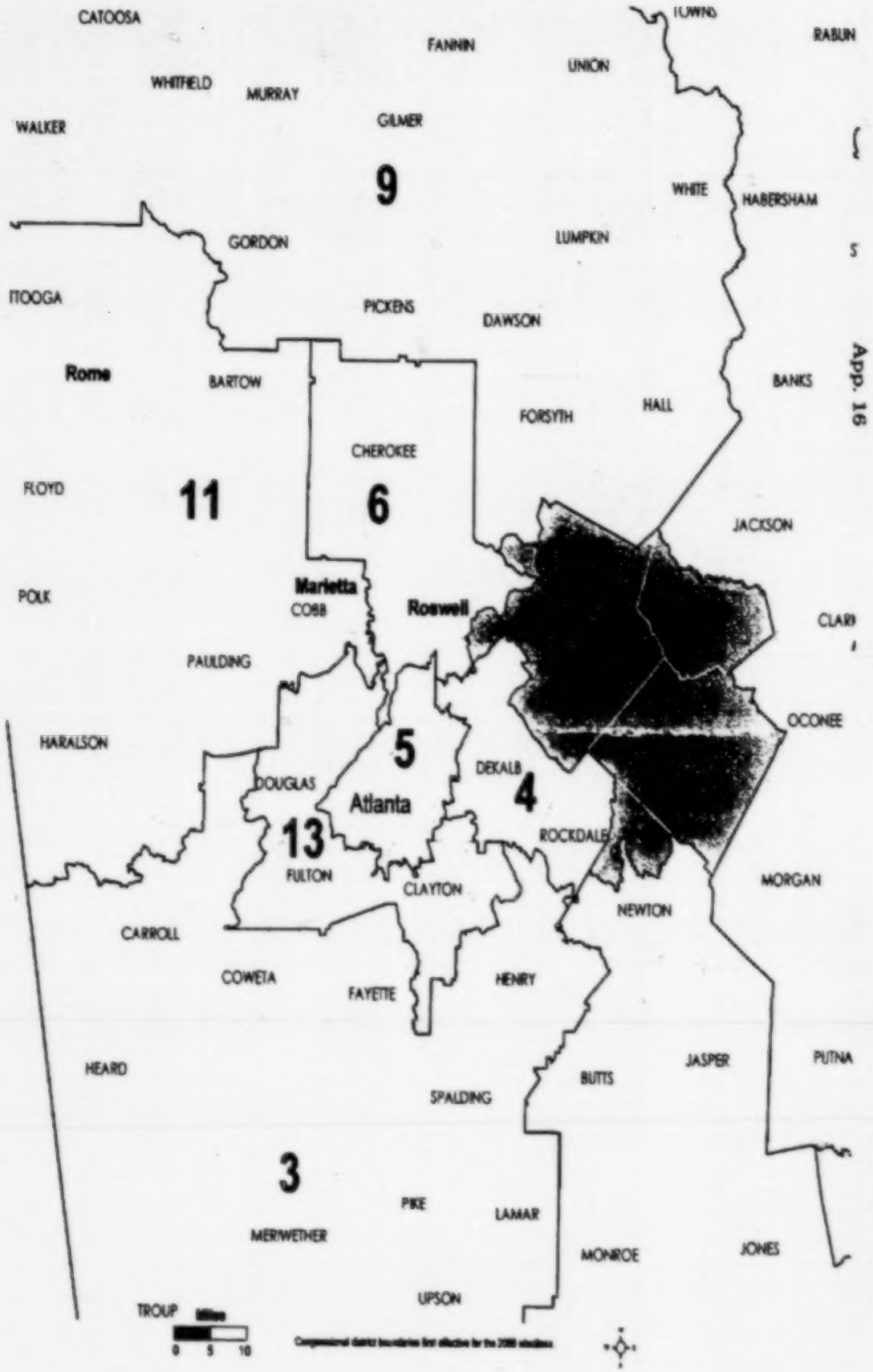
Georgia

Congressional Districts for 2002-2004 elections.



Georgia

Congressional Districts for 2006-2010 elections.



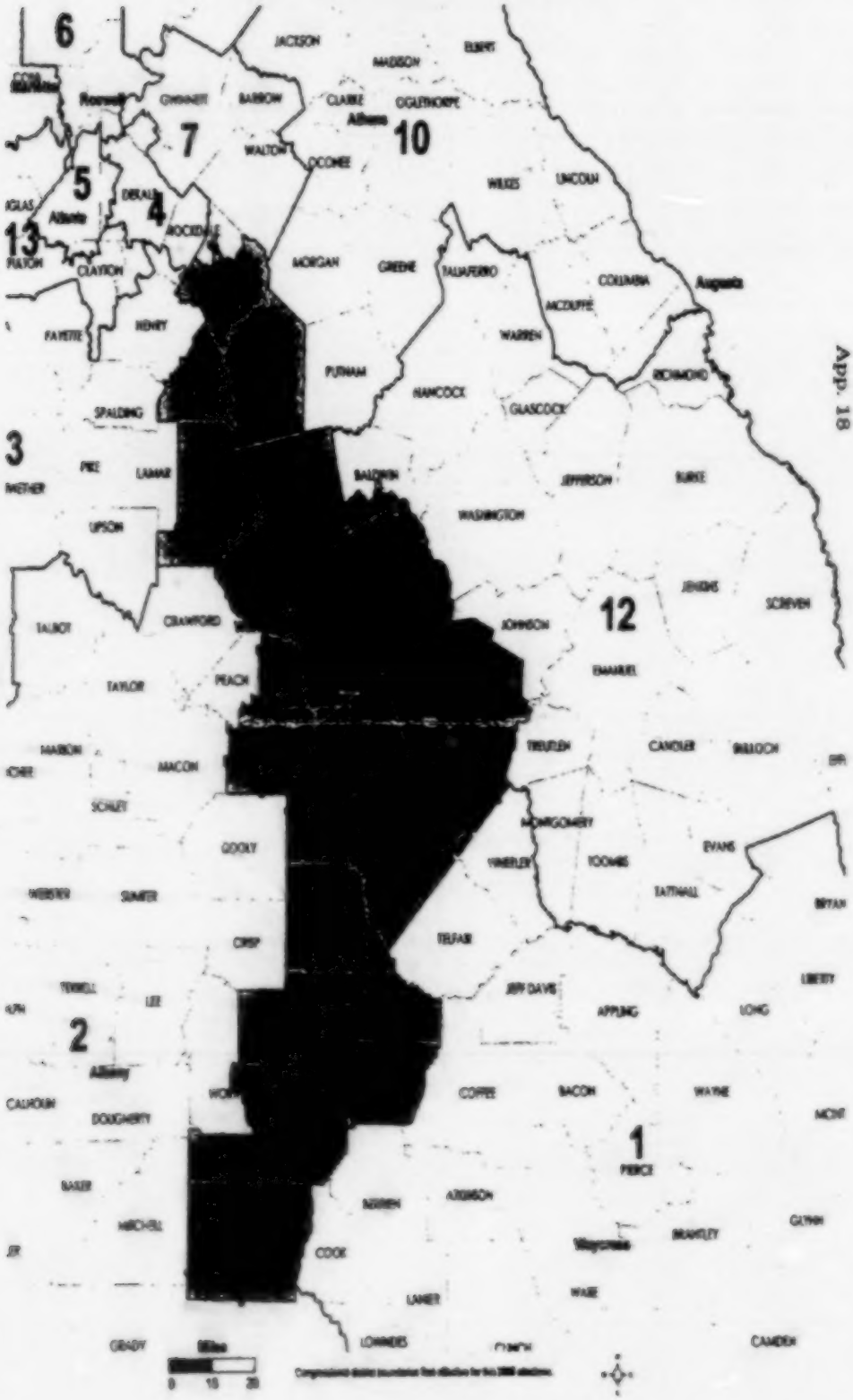
App. 16

Georgia

Congressional Districts for 2002-2004 elections.

Georgia

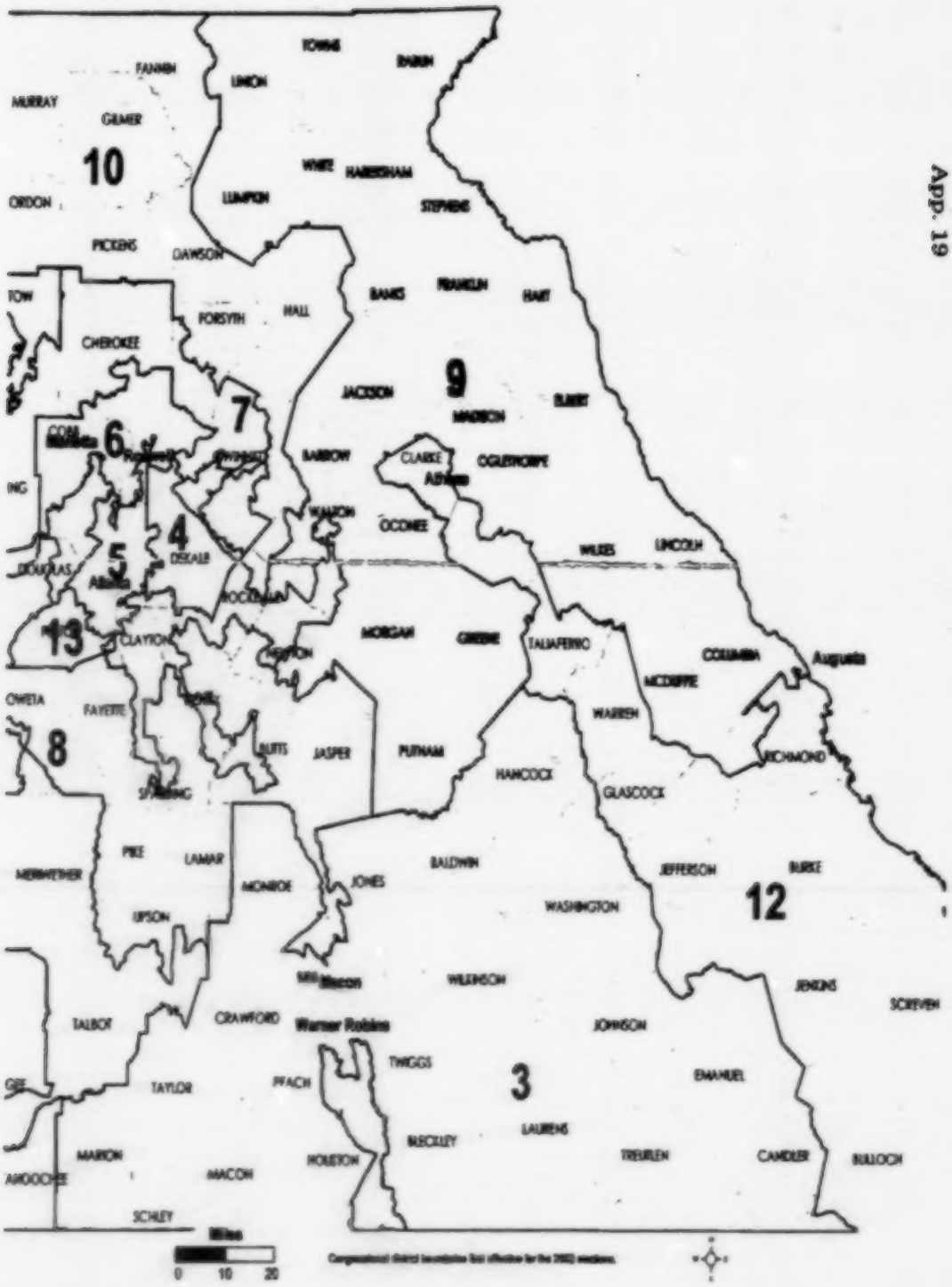
Congressional Districts for 2006-2010 elections.



App. 18

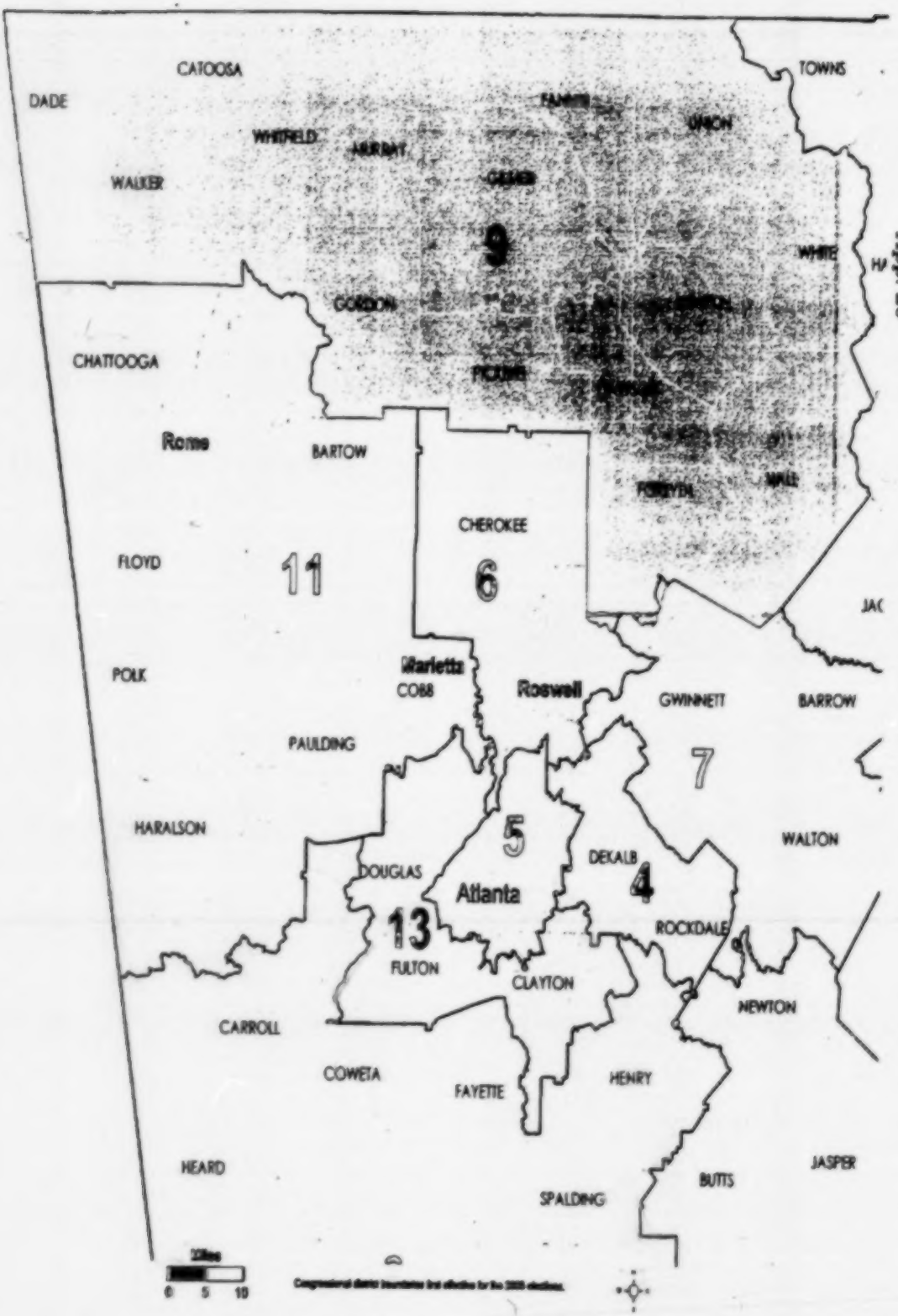
Georgia

Congressional Districts for 2002-2004 elections.



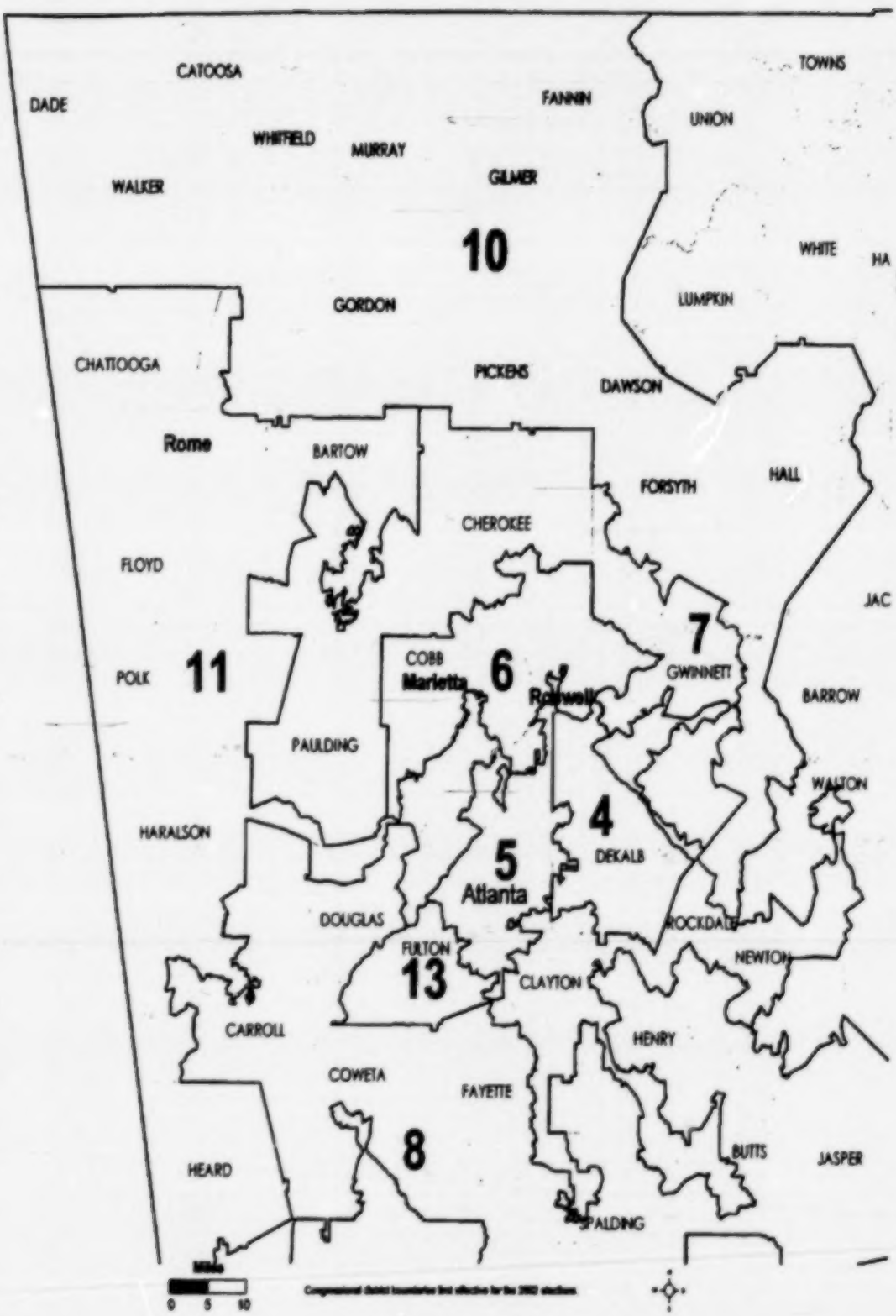
Georgia

Congressional Districts for 2006-2010 elections.



Georgia

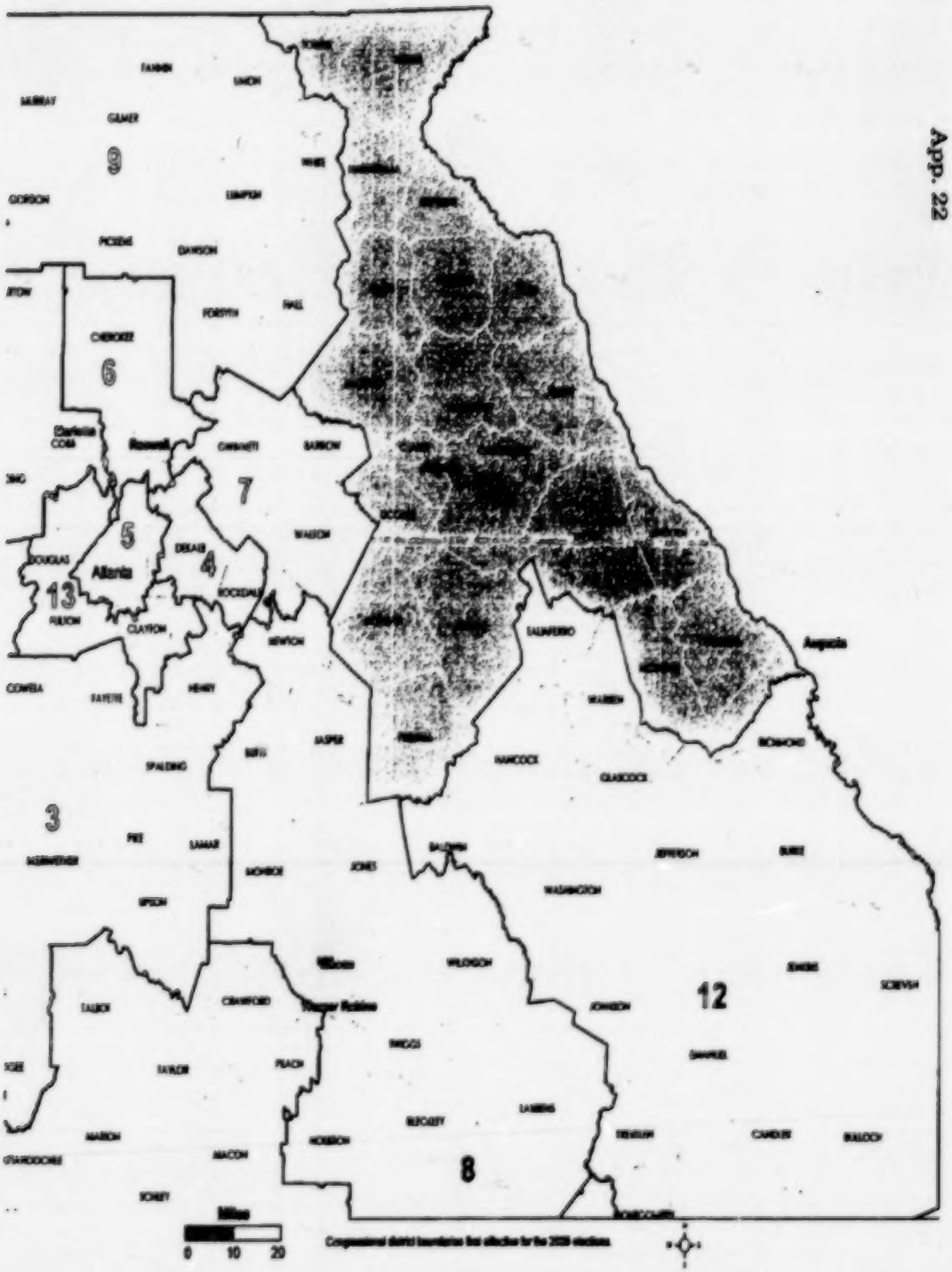
Congressional Districts for 2002-2004 elections.



App. 21

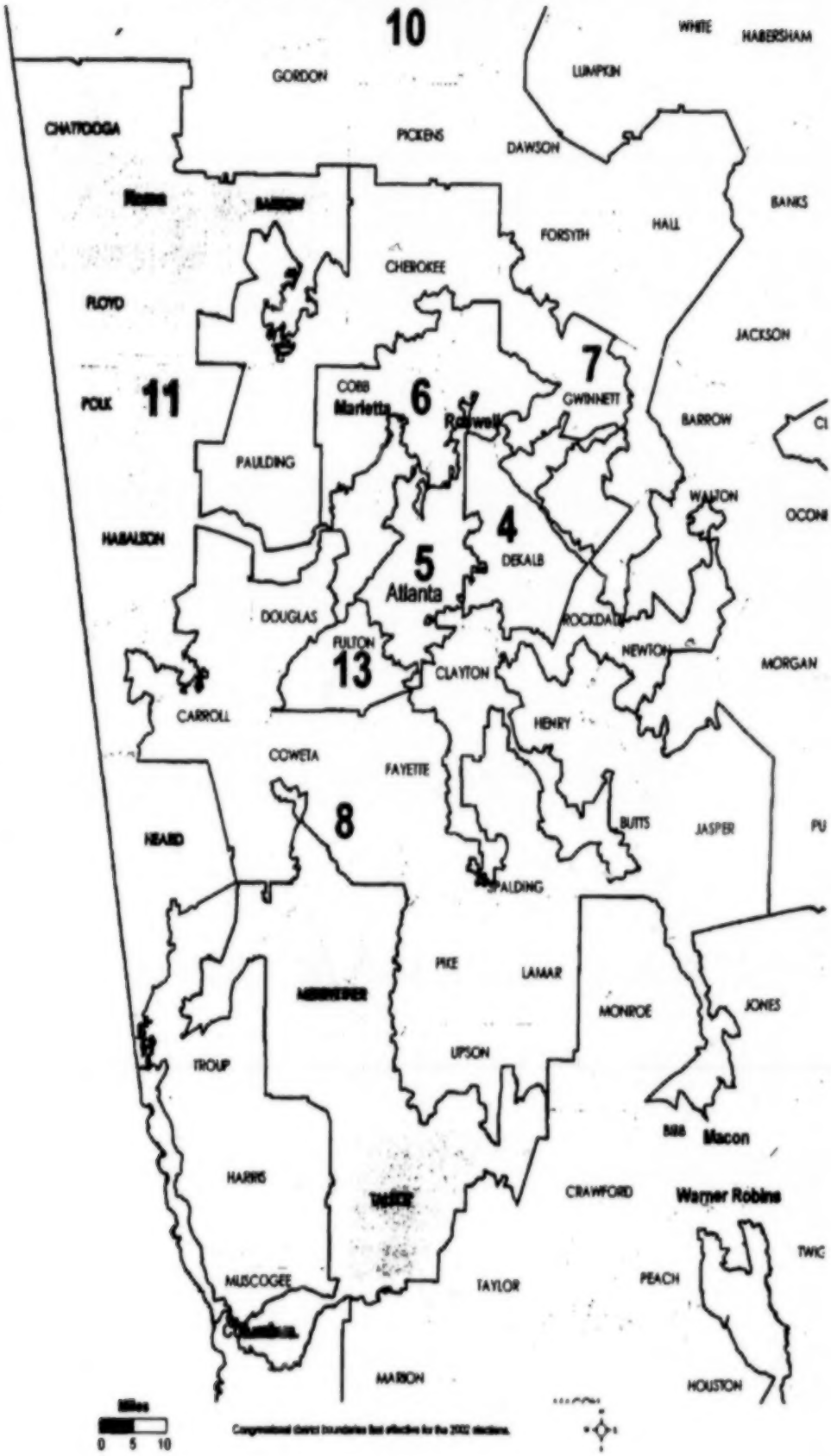
Georgia

Congressional Districts for 2006-2010 elections.



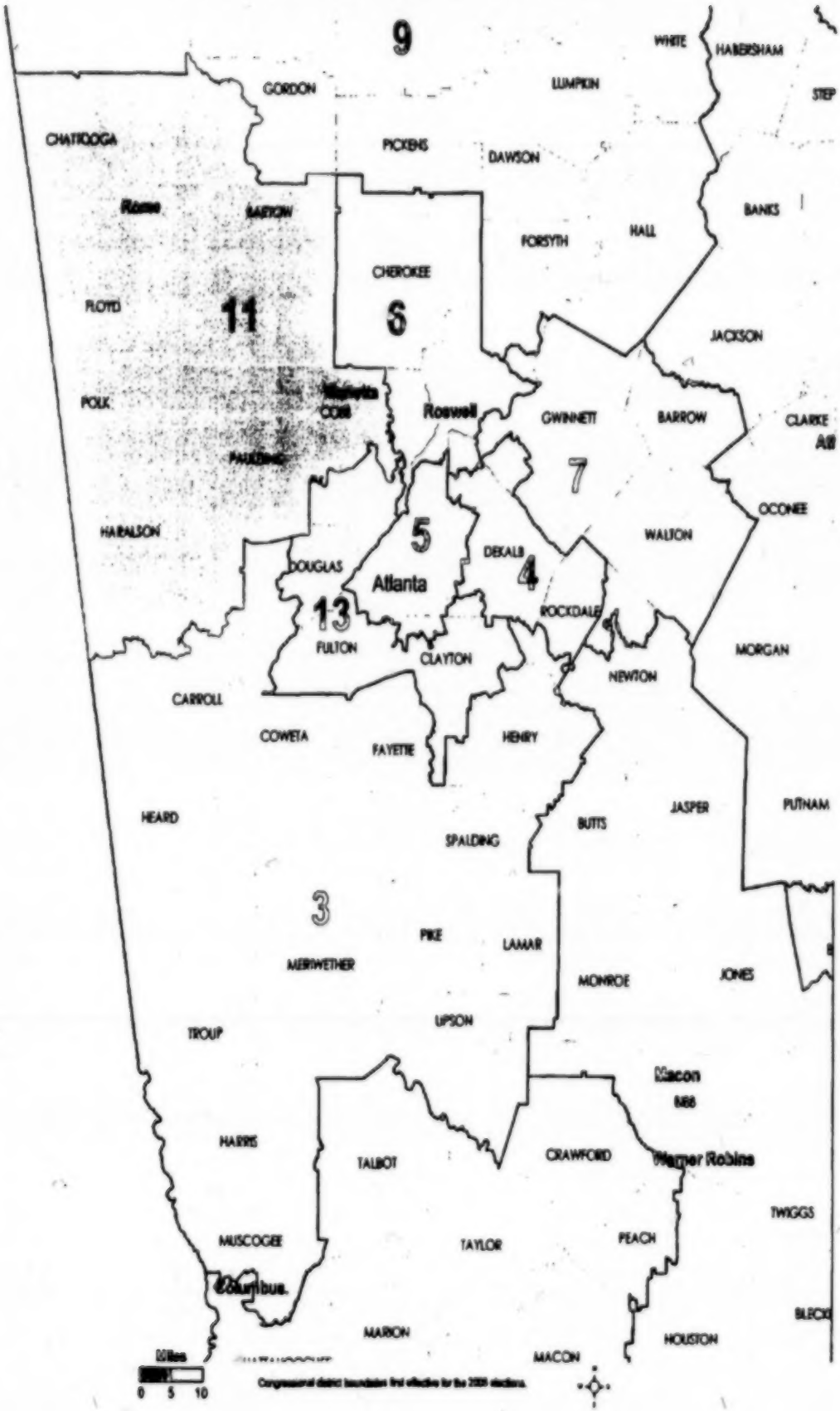
Georgia

Congressional Districts for 2002-2004 elections.



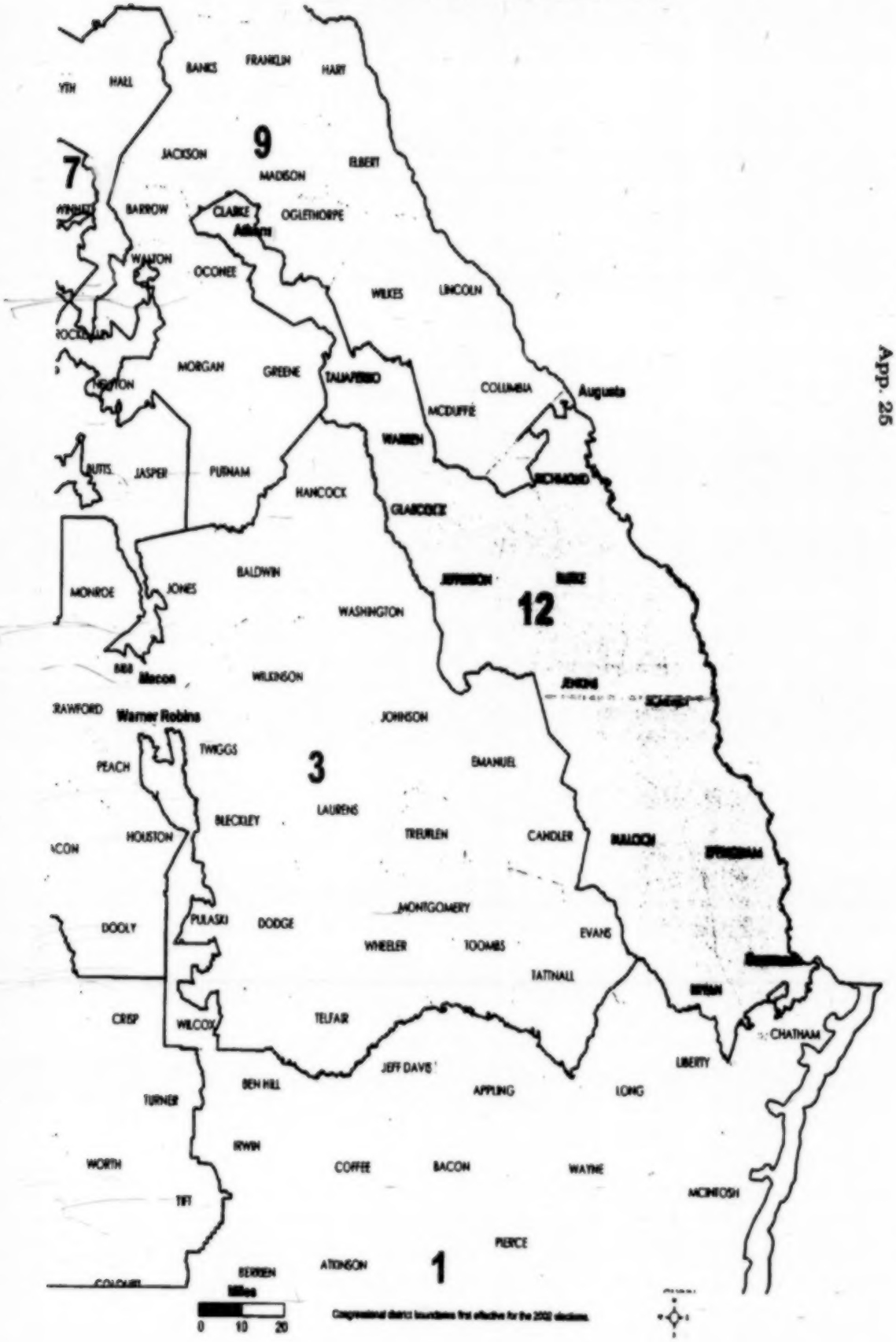
Georgia

Congressional Districts for 2006-2010 elections.



Georgia

Congressional Districts for 2002-2004 elections.



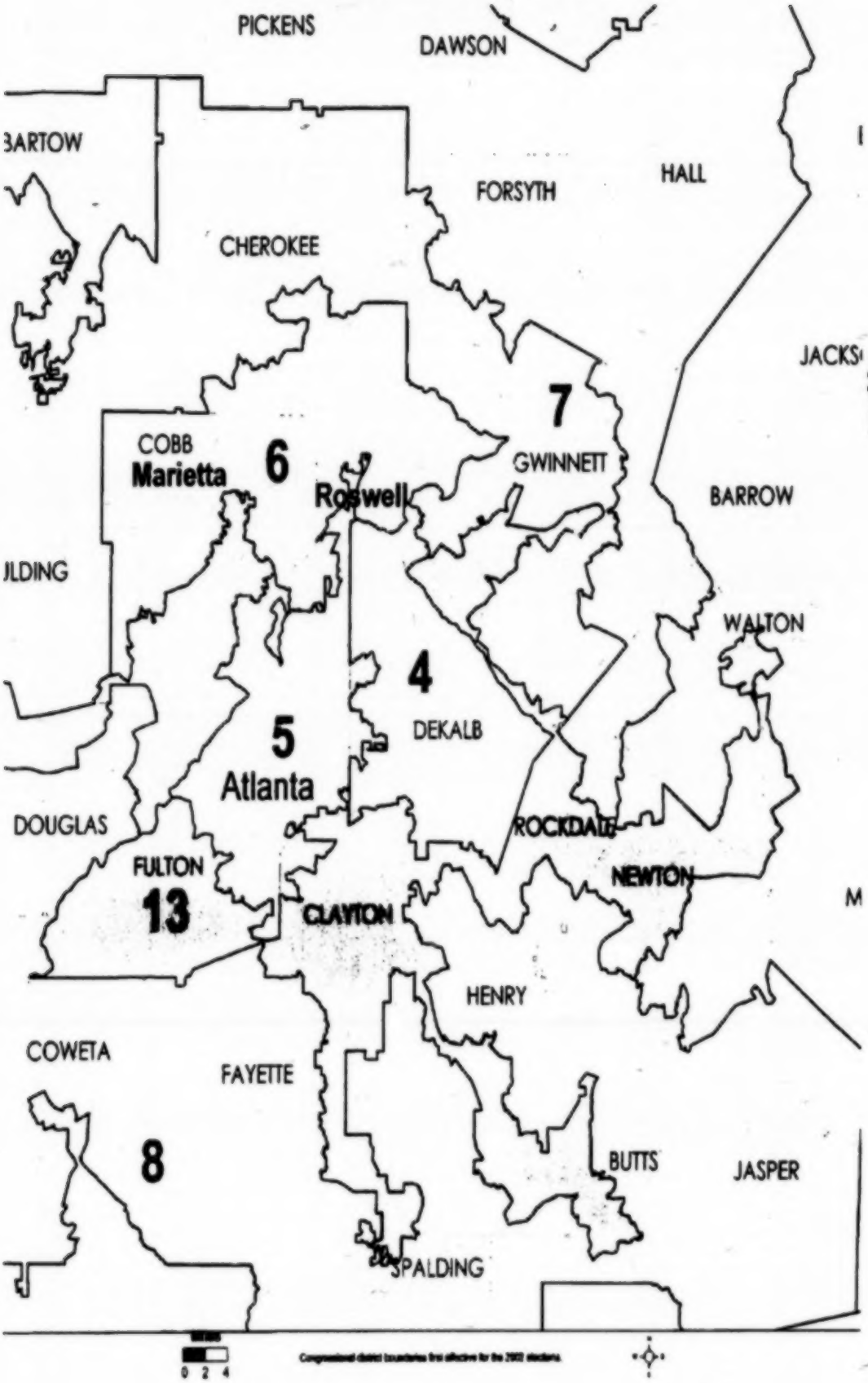
Georgia

Congressional Districts for 2006-2010 elections.

App. 26

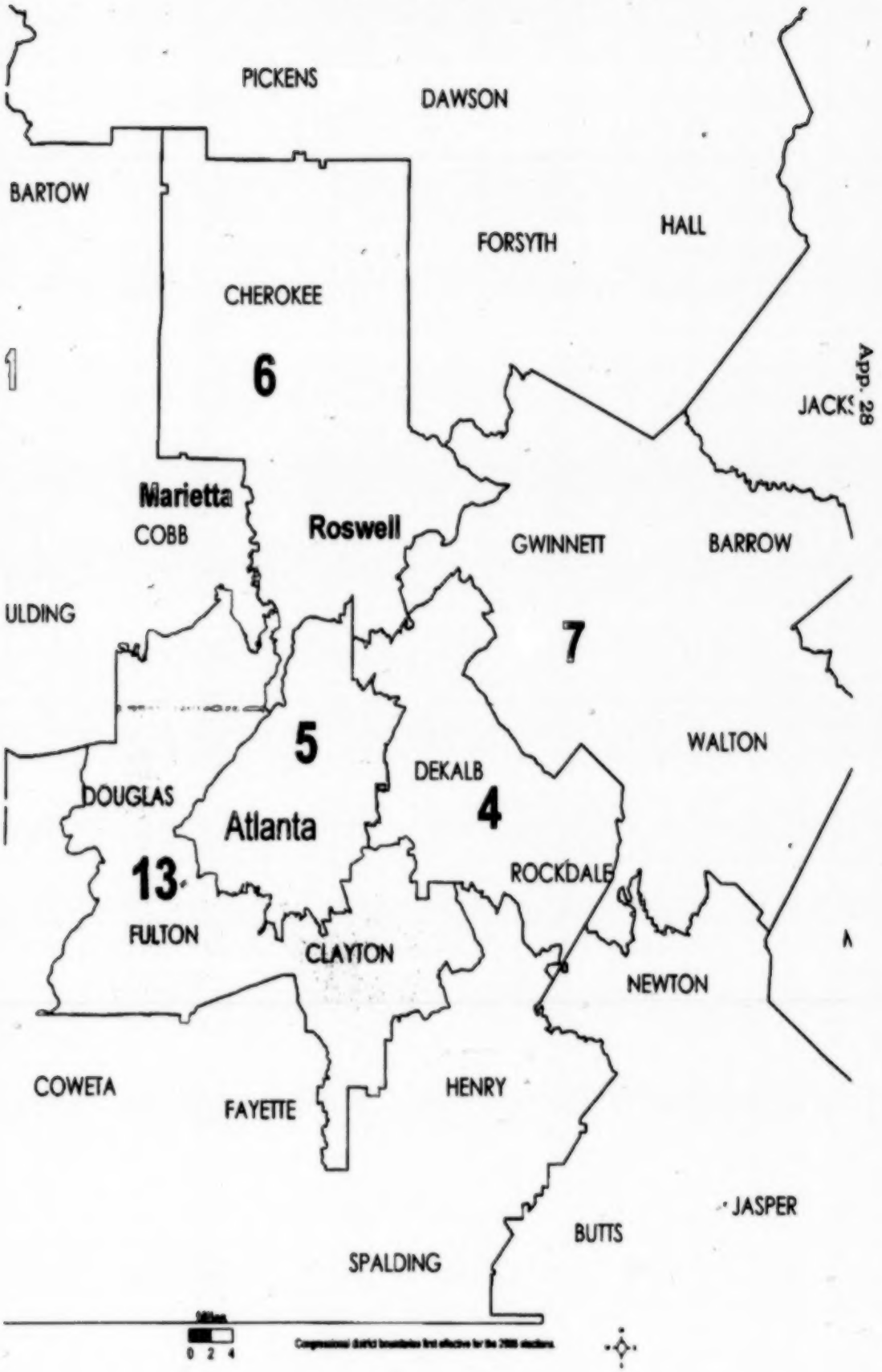
Georgia

Congressional Districts for 2002-2004 elections.



Georgia

Congressional Districts for 2006-2010 elections.



Supreme Court, U.S.
FILED
FEB 1 - 2006
OFFICE OF THE CLERK

Nos. 05-204, 05-254, 05-276 & 05-439

In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *ET AL.*,
APPELLANTS

v.

RICK PERRY, *ET AL.*, APPELLEES

AND CONSOLIDATED CASES

On Appeal From the United States District Court for the Eastern District of Texas

BRIEF FOR THE STATES OF UTAH, NEVADA, AND OHIO AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

JAMES R. THOMPSON
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

MARK SHURTLEFF
Counsel of Record
Attorney General of Utah
P.O. Box 142320
Salt Lake City, UT 84114
(801) 538-1191

GEORGE J. CHANOS
Attorney General of Nevada
Nevada Department of Justice
100 North Carson Street
Carson City, NV 89701
(775) 684-1100

GENE C. SCHAERR
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Amici Curiae
[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

JIM PETRO
Attorney General of Ohio
30 East Broad Street
17th Floor
Columbus, OH 43215
(614) 466-4320

QUESTION PRESENTED

Whether the Constitution permits the States to draw congressional district lines based on data from the most recent decennial census and in a manner that results in a more accurate reflection of their citizens' statewide voting patterns.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Text And History Confirm That The Constitution Permits The Federal Judiciary To Intervene In Redistricting Decisions Only In the Most Unusual and Egregious Circumstances. 7

A. By conferring on State legislatures responsibility for redistricting, subject to unusually broad oversight by Congress, the Framers signaled that federal courts would rarely intervene in redistricting. 8

B. Congress's historical willingness to exercise its supervisory authority significantly reduces the need for judicial intervention under the Constitution. 15

C. This Court historically has declined to invoke the Constitution as a basis for intervening in redistricting, leaving such matters to legislatures, which have greater institutional competence in this area. 17

II. The Fact That A Political Party Benefited From A Redistricting Decision Does Not Give Rise To Even A Presumption Of Unconstitutionality 20

III. The Constitution Permits The States To Redraw Congressional Districts Mid-Decade Based On The Most Recent Decennial Census Data.....25

CONCLUSION.....30

TABLE OF AUTHORITIES

Page(s)

CASES:

Colegrove v. *Green*, 328 U.S. 549 (1946).....11, 15, 17, 25

Connor v. *Finch*, 431 U.S. 407 (1977).....2, 18

Davis v. *Bandemer*, 478 U.S. 109 (1986).....18, 20-21, 25

English v. *General Elec. Co.*, 496 U.S. 72 (1990).....9

Gaffney v. *Cummings*, 412 U.S. 735 (1973).....21-23, 26-27

Georgia v. *Ashcroft*, 539 U.S. 461 (2003).....27

Growe v. *Emison*, 507 U.S. 25 (1993).....1

Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).....9

Karcher v. *Daggett*, 462 U.S. 725 (1983).....26-27

Katzenbach v. *Morgan*, 384 U.S. 641 (1966).....9

Legislature v. *Deukmejian*, 669 P.2d 17 (Cal. 1983).....30

Miller v. *Johnson*, 515 U.S. 900 (1995).....1, 2, 18, 21

New York v. *United States*, 505 U.S. 144 (1992).....9-10

People ex rel. Salazar v. *Davidson*, 79 P.3d 1221 (Colo. 2003).....30

Printz v. *United States*, 521 U.S. 898 (1997).....9

Reynolds v. *Sims*, 377 U.S. 533 (1964).....28

Shaw v. *Reno*, 509 U.S. 630 (1993).....11, 20

South Dakota v. *Dole*, 483 U.S. 203 (1987).....9

Upham v. *Seamon*, 456 U.S. 37 (1982).....29

Vieth v. *Jubelirer*, 541 U.S. 267 (2004).....*passim*

Wesberry v. *Sanders*, 376 U.S. 1 (1964).....8, 10-11, 15-16

White v. *Weiser*, 412 U.S. 783 (1973).....1, 18, 29

Wise v. *Lipscomb*, 437 U.S. 535 (1978) 28-29

Wood v. *Broom*, 287 U.S. 1 (1932) 16

Ex Parte Young, 209 U.S. 123 (1908) 9

CONSTITUTIONS, STATUTES, AND RULES:

U.S. Const. art. I, § 4 ..... *passim*

U.S. Const. amend. XIV 2, 9

U.S. Const. amend. XV 9

2 U.S.C. § 2c 17

Voting Rights Act, 42 U.S.C. § 1971 *et seq* 2, 9, 11

42 U.S.C. § 1983 9

5 Stat. 491 (1842) 15

12 Stat. 572 (1862) 15

17 Stat. 28 (1872) 15

22 Stat. 5 (1882) 16

26 Stat. 735 (1891) 16

31 Stat. 733 (1901) 16

37 Stat. 13 (1911) 16

54 Stat. 162 (1940) 17

55 Stat. 761 (1941) 17

81 Stat. 581 (1967) 17

Ala. Const. art. IX, §§ 198, 200 30

Ariz. Const. art. IV 29

Conn. Const. art. III, § 6 ..... 29, 30

Del. Code Ann. tit. 29, § 805 30

Haw. Const. art. IV, §§ 1, 2 30

Mass. Const. amend. art. CI, § 2 30

Mont. Const. art. V, § 14 29-30

N.C. Const. art. II, §§ 3, 5 30

N. J. Const. art. II, § II, ¶ 8 29

N.M. Const. art. IV, § 3 30

Ohio Const. art. XI, §§ 1, 6 30

Pa. Const. art. II, § 17 30

S.C. Const. art. VII, § 13 30

Tenn. Code Ann. § 2-16-102 29-30

Tenn. Code Ann. §§ 3-1-102, -103 30

Wash. Rev. Code § 44.05.030 ..... 29, 30

Wyo. Const. art 3, § 49 30

MISCELLANEOUS:

Congressional Quarterly, *CQ's Politics in America 2002* 24

Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 440 (2d ed. 1888) 12-13, 21

Max Farrand, *Records of the Federal Convention of 1787* (1966) 11-12, 21

The Federalist, No. 59 (Alexander Hamilton) (Garry Wills ed. 1982) 14

Elmer C. Griffith, *The Rise and Development of the Gerrymander* 26 (reprint ed. 1974) 21

Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. Pub. Pol. 103 (2000) 19, 26-27

Herbert J. Storing, *The Complete Anti-Federalist* 386 (1981) 13

Joseph Story, *Commentaries on the Constitution of the United States* (1833) 13-14

INTERESTS OF *AMICI CURIAE*

Amici strongly oppose appellants' effort in these cases to restrict the States' constitutional prerogative to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4. As this Court has repeatedly acknowledged, "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); accord *White* v. *Weiser*, 412 U.S. 783, 795 (1973). Although the Court has rightly held that judicial involvement in redistricting may be necessary to ensure compliance with the Voting Rights Act and certain constitutional mandates, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995). Moreover, because "[e]lectoral districting is a most difficult subject for legislatures, *** the States must have discretion to exercise the political judgment necessary to balance competing interests." *Ibid.* Indeed, this Court has *never* struck down a State's congressional redistricting plan as an unconstitutional "partisan gerrymander."

Appellants nevertheless argue that, because Texas's redistricting plan was adopted mid-decade and (as usual) benefited one political party over another, the federal courts can and indeed *must* substitute their views of appropriate political representation for the views of elected state officials. Such a result would not only disregard the constitutional separation of powers—which expressly assigns to Congress rather than the courts the responsibility for supervising state redistricting decisions—but it would also denigrate the States' constitutional dignity. This Court has recognized that "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise

sometimes conflicting state apportionment policies in the people's name." *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977). Thus, as Justice Ginsburg has observed, "federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions." *Miller*, 515 U.S. at 934-935 (dissenting opinion).

Amici's purpose in filing this brief is *not* to take sides on an issue of partisan politics. To be sure, as with virtually all redistricting plans, the plan at issue here happened to benefit one political party. As sovereign States, however, *amici* have no interest in the partisan consequences of this case. Rather, they seek to ensure that *all* redistricting cases are governed by neutral legal principles and that the federal courts respect the constitutional limits on their role in resolving such cases. Accordingly, the principles that *amici* advocate here would apply with equal force in cases where the political parties' interests are reversed.

In short, *amici* seek to defend their traditional role, expressly mandated by Article I, § 4 of the Constitution, as the primary decisionmakers in congressional redistricting, and to urge the Court to reject the "unprecedented intervention in the American political process" that appellants urge here. *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

STATEMENT

These are "partisan gerrymandering" cases in which the appellants argue that the Texas legislature's 2003 alterations of the State's congressional districts violated the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Appellants make two basic constitutional arguments. First, they say that Texas's redistricting plan is "unconstitutionally tainted by excessive partisan purpose" because it is "driven *solely* by a partisan agenda." App. 1a, 10a (emphasis added). Second, they contend that the "one person, one vote" principle

precludes state legislatures from engaging in "voluntary" mid-decade redistricting—*i.e.*, mid-decade redistricting that is not ordered by a court. *Id.* at 31a-39a.

Analyzing the issues here in light of this Court's decision in *Vieth*, a three-judge panel of the district court rejected these arguments and sustained the 2003 redistricting plan in its entirety. The court began by noting the historical context in which the Texas legislature enacted that plan. For roughly the first century after Reconstruction, one party, "the Democratic Party[,] dominated the political landscape in Texas." App. 10a-11a. Even as late as the 1960s and 1970s, the voting strength of the other major party "on a statewide basis hovered near 35%," during which time that party "never held more than four congressional seats at one time." *Id.* at 11a. Thus, "the Texas delegation has enjoyed non-competitive districts for at least the past four and one-half decades." *Id.* at 2a.

The Democratic Party's dominance gradually began to decline in the 1960s. As of 1990, however, they held 19 of the 27 Texas congressional seats. *Id.* at 12a. And in 1991, as Republicans were gaining statewide voting strength equal to the Democratic party, the latter party adopted a redistricting plan that enabled it to maintain a majority of congressional seats throughout the 1990s. *Ibid.* In 1992, for example, Democrats won 21 of 30 congressional seats "even though the 'tipping point' had been reached" with both parties "capturing an equal share of the vote in statewide races." *Ibid.* And in 2000, "Democrats captured seventeen congressional seats to the Republicans' thirteen * * *, despite Republicans garnering 59% of the vote in statewide elections." *Ibid.*

After the 2000 census, when the Texas legislature failed to reach agreement on new congressional districts, the district court itself imposed a plan that merely "perpetuated much of the 1991 Democratic Party gerrymander." *Id.* at 12a-13a. By 2003, however, the Republican Party controlled the Texas